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.

PLAINTIFF'S OPPOSITION TO SECRETARY'S MOTION FOR SUMMARY JUDGMENT

"[It is] the part of a wise man … not [to] venture all his eggs in one basket."

Miguel de Cervantes, *Don Quixote*

Defendant Secretary of State ("Secretary") has staked her whole case on the claim that the First Amendment rights of Plaintiff Colorado Republican Party ("Party") are not substantially burdened (if at all) by the mandate in Proposition 108 that it allow unaffiliated voters to participate in its primary election, and that she therefore need only offer a legitimate governmental interest that is reasonably furthered by the mandate. She does not even address in the alternative, much less persuasively contend, that the government's interests here are compelling, or that the unaffiliated voter mandate is narrowly tailored to further those interests. Yet the premise of "minimal burden" from which her rational basis analysis proceeds is flawed, for it ignores key court decisions to the contrary.

If, as the Party has contended in its Motion for Partial Summary Judgment and reiterates here, its First Amendment rights are substantially burdened, at least with respect to its as-applied challenges, the Secretary's failure to offer a compelling interest, narrowly tailored, is not only fatal to her Motion for Summary Judgment, but compels the grant of Summary Judgement for the Party.

RESPONSE TO STATEMENT OF UNDISPUTED FACTS[1]

1-39. Admit.

40. Deny. State law, specifically C.R.S. § 1-3-103. mandates a large list of people who "shall" be on the State Central committee.

41-42. Admit.

STATEMENT OF DISPUTED FACTS

1. The parties dispute whether the opt-out provision of Proposition 108 presents a feasible alternative to the open primary, given its supermajority vote requirement of three-fourths of the entire membership of the Party's State Central Committee. The Party's witnesses have described the opt-out provision as "nearly impossible to achieve" or "very difficult." Ex. 8, PI Tr. at 201-02 (Lundberg testimony); 228 (England testimony). The Secretary has admitted that even a lesser, two-thirds of those present and voting threshold, is "difficult to pass." DSUF 20. The Secretary's witnesses contended that the threshold "could" be met "if the political will was present." Ex. 8, PI Tr. at 271 (Taheri testimony); 345 (Wadhams testimony).

STATEMENT OF ADDITIONAL UNDISPUTED FACTS

[1] We use the following abbreviations herein:
DSUF: Defendant's Statement of Undisputed Facts
PSUF: Plaintiff's Statement of Undisputed Facts (from Mot. for Partial Summary Judgment)
PSDF: Plaintiff's Statement of Disputed Facts
PSAUF: Plaintiff's Statement of Additional Undisputed Facts
PI Tr.: Preliminary Injunction hearing transcript
MSJ: Secretary's Motion for Summary Judgment
MPSJ: Plaintiff's Motion for Partial Summary Judgment

1. By significantly increasing the pool of voters eligible to vote in primary elections, an increase in voter turnout, as well as the turnout rate (as calculated against total registered voters, not just total registered voters eligible to vote) is a virtual certainty. Ex. 7, Chamber of Commerce White Paper ("allowing unaffiliated voters to vote in primary elections … will help … [i]ncrease turnout and participation, simply because unaffiliated voters, of which there are more than 1 million in Colorado, would be able to vote in primaries.").

2. The turnout rate in the 2016 primary election, calculated against the number of active and total registered voters who were eligible to vote in the primary election (Republicans and Democrats only) was 34.8% an 29.9%, respectively. Ex. 9, Bjorklund Declaration, ¶ 10.

3. Since Proposition 108 took effect in 2018, the number of unaffiliated voters participating in Republican primary elections as a percentage of total votes cast in those elections, increased from 20.1% in 2018, to 23.3% in 2020, and to 37.1% in 2022. Ex. 9, Bjorklund Declaration, ¶ 5.

4. Total primary turnout as a percentage of total registered voters has declined by nearly 4½ percentage points since its initial bump up in the immediate wake of Proposition 108's adoption, from 30.39% in 2018 to 25.99% in 2024. Similarly, as a percentage of active registered voters, turnout declined from 35.12% in 2018 to 31.96% in 2022, more than 3 percentage points. Ex. 9, Bjorklund Declaration, ¶ 7.

ARGUMENT

I. As Applied, the Unaffiliated Voter Mandate Severely Burden's the Party's Associational Rights and is Therefore Subject to Strict Scrutiny

a. Court decisions, including the Supreme Court's decision in *Jones*, do not require proof that unaffiliated voters actually effected election outcomes or altered candidate positions, only that their mere inclusion in the nomination process poses such a risk.

The Secretary admits, as she must, that severe burdens on a political party's freedom of association are subject to strict scrutiny. MSJ at 10 (citing *Utah Republican Party v. Cox*, 892 F.3d

1066, 1077 (10th Cir. 2018) (in turn quoting *Clingman v. Beaver*, 544 U.S. 581, 586 (2005))). Her contention that the Colorado Republican Party's as-applied challenge to the mandate imposes only a minimal burden which is subject merely to rational basis review ignores cases that are directly on point and to the contrary, instead asserting that she is entitled to summary judgment because the Party has not produced empirical evidence demonstrating "that unaffiliated voters have changed the outcome of any of the Party's primary races," "resulted in the nomination of candidates whose policy positions differ from the Party's platform," or "caused its candidates to moderate their policy positions." MSJ at 13-15.

The fundamental and fatal flaw in the Secretary's argument is that she treats each of these concerns, recited during the course of the Supreme Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), as though they are *elements* necessary to demonstrate that the burden imposed on the Party by the unaffiliated mandate is severe. But the Supreme Court had not treated these as *elements*, either in *Jones* or anywhere else. Rather, the *Jones* Court raised these issues as examples of the dangers that arise when the government "forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." *Id.*, 530 U.S. at 577. It was the risk that such dangers might arise, not proof that any one of those dangers had come to pass, that led the Court to find the mandate itself posed a severe burden on the Party. *See id.* at 578 (describing the "*prospect* of having a party's nominee determined by adherents of an opposing party"); *id.* at 578-79 (describing as an "obvious proposition" that the substantial number of voters who have chosen not to join the political party "often have policy views that diverge from those of the party faithful"); *id.* at 579 (recounting expert testimony describing it as "inevitable … that parties will be forced in some circumstances to give their official designation to a candidate who's not preferred by a majority or even plurality of party members").

After reciting its litany of prospective dangers, the *Jones* Court summarized as follows: "Proposition 198 forces petitioners to adulterate their candidate-selection process—the 'basic function of a political party'—by opening it up to persons wholly unaffiliated with the party." *Id.* at 581 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)). It then described that such a forced association has the "*likely* outcome" – indeed, its "*intended* outcome" – "of changing the parties' message." *Id.* at 581-82 (first emphasis added). It did not require proof of that likely outcome; the forced association was sufficient to create the risk of such an unconstitutional result.

Two of the three cases on which the Secretary relies are not to the contrary, and the third—a non-binding district court decision out of South Carolina—addressed a facial challenge, not an as-applied challenge as is at issue in this section.

The main problem that led to the grant of summary judgment against the Democratic Party plaintiff in *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119 (9th Cir. 2016), was not that the Party failed to prove the open primary produced different nominees or different positions, although both dangers were mentioned, but that the Party's statistical evidence (65,000 formally registered party members, versus a quarter of a million voters in its primary) essentially asked the court "to infer that the approximately 185,000 people voting in its primaries who have not formally registered with the Party are participating in crossover voting." *Id.* at 1124. In the facial challenge at issue in that case, such evidence was "not sufficient" in a state like Hawaii that does not provide for partisan registration, the court held, because "the 185,000 people voting in Hawaii's Democratic primaries who are not formal Party members may nevertheless personally identify as Democrats." *Id.* at 1125. "Thus, unlike in *Jones*, the Democratic Party has provided no evidence showing a 'clear and present danger' that adherents of opposing parties determine the Democratic Party's nominees," the Court concluded. *Id.*

So, too, with *Idaho Republican Party v. Ysursa*, 660 F. Supp. 2d 1195 (D. Idaho 2009)

(*Ysursa I*), also cited by the Secretary. The court denied the cross-motions for summary judgment because "on the current record" before it, "genuine issues of material fact remain—mainly whether and to what extent 'cross-over' voting exists in Idaho, and whether and to what extent the threat of such 'cross-over' voting affects the message of [the Idaho Republican Party] and its candidates." *Id.* at 1201. "Therefore," the Court concluded, "the Court cannot determine whether Idaho's open primary subjects the Republican Party's candidate-selection process to persons wholly unaffiliated with the party." *Id.* at 1201 (citing *Jones*, 530 U.S. at 581).

Significantly, in a subsequent decision in the same case that the Secretary fails to bring to the Court's attention, the Idaho District Court described that its "main concern" at the summary judgment stage "was whether crossover voting *existed* in Idaho under its open primary" when the record at that point "contained no evidence on that issue." *Idaho Republican Party v. Ysursa*, 765 F. Supp. 2d 1266, 1276 (D. Idaho 2011) (*Ysursa II*) (emphasis added). It then held that the acknowledgement by defendant's own experts that "voters do *likely* cross over" to vote in Republican primaries, *id*. at 1273 (emphasis added), was sufficient for it to hold that "the current primary system in Idaho imposes a severe burden on the Idaho Republican Party's First Amendment rights," *id*. at 1276. Here, because it is undisputed that unaffiliated voters participate in Republican primaries at significantly higher rates than the 10% found sufficient in *Ysursa II*, *see* PSAUF 3, the "severe burden" on the Party is established as a matter of law.[2]

Other cases even more directly support the Party's contention that the forced inclusion of large numbers of unaffiliated voters in its primary is alone sufficient to establish a severe burden

[2] The Secretary correctly points out that the South Carolina District Court in *Greenville Cnty. Republican Party Executive Comm. v. South Carolina*, 824 F. Supp. 2d 655, 665 (D.S.C. 2011), did mention that *Jones* evaluated the California blanket primary law after receiving "testimony regarding the effects of cross-over voting," and that Plaintiffs in the case had presented "no similar empirical evidence." As noted above, *Jones* did not treat such effects as elements necessary to establish a severe burden.

on its associational rights. In *Utah Republican Party v. Herbert*, 144 F.Supp.3d 1263 (D. Utah 2015), for example, the mere fact that Utah's law, as applied, "force[d] [Qualified Political Parties] to flood their primary election with thousands of unaffiliated voters" was sufficient to subject the law to strict scrutiny and render it unconstitutional when the State failed to demonstrate that it was narrowly tailored to further a compelling interest. *Id.* at 1280. Although the State did not appeal that part of the district court's ruling to the Tenth Circuit because the legislature promptly repealed the unconstitutional unaffiliated voter mandate, the Tenth Circuit referenced that holding repeatedly. *Utah Republican Party v. Cox*, 892 F.3d 1066, 1073, 1074, 1080 (10th Cir. 2018). And it did so with apparent agreement. *See id.* at 1081 ("The URP, like all political parties, has 'a right to identify the people who constitute the association, and to select a standard bearer who best represents the party's ideologies and preferences.'…That is why the district court declared the Unaffiliated Voter Provision, which forced the URP to allow nonmembers to help select its candidates, unconstitutional in the First Lawsuit." (quoting *Eu v. San Francisco Cnty. Dem. Central Comm.*, 489 U.S. 214, 224 (1989))).

Similarly, the Fourth Circuit in *Miller v. Brown*, 503 F.3d 360, 368 (4th Cir. 2007), focused solely on the fact that, as applied,[3] Virginia law forced the party to include non-party members in its primary election. It did not address, or require evidence about, the *effect* of including non-party members in the primary election. The mere fact that Virginia law, as applied, "forced the Committee to use a nomination process that prevented it from excluding voters with whom it did not wish to associate" was sufficient to establish a severe burden, which rendered the law unconstitutional

[3] The party's *facial* challenge failed because Virginia law allowed political parties to choose candidates by several "methods other than" the open primary, methods under which the Party could restrict participation to its own members. *Miller*, 503 F.3d at 368. Unlike the Colorado law at issue here, however, a supermajority vote was not required in order to choose one of those other methods. *See* Va. Code Ann. § 24.2-509(A).

because none of the State's asserted interests (the same ones advanced by the Secretary here) were compelling or narrowly tailored. *Id.* at 364, 368, 371.

Even more authoritative is the Supreme Court's decision in *Democratic Party of U. S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981). That case involved a challenge to the constitutionality of Wisconsin's requirement that delegates to the Democrat National Convention be bound by the results of an open primary election not limited to Democrat party members, which violated national party rules. The Supreme Court held that the requirement was an unconstitutional violation of the national party's freedom of association. In so holding, the Court focused solely on the fact that unaffiliated voters were included in the primary election, stating: "On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing the party's essential functions—and that political parties may accordingly protect themselves 'from intrusion by those with adverse political principles.'" *Id.* at 122. Not only did the Court not require additional proof of actual distortion—the obvious risk that such distortion "may" occur was sufficient—it added that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party" because a "political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution." *Id.* at 123-24.[4]

The Secretary's contention here would essentially have *Jones* overruling the *La Follette* Court's reliance only on the fact that unaffiliated voters were included in the nomination process.

[4] Earlier in its opinion, when describing why the national party had adopted its rule against delegations chosen by, or bound by, a process that included unaffiliated voters, the Court did mention that the Party adopted its rule based on a study that had found, among other things, that crossover voters altered the composition of the delegate slate chosen in Wisconsin." *Id.* at 118. That evidence of *effects* was not part of the Court's holding, however. Indeed, the Court disavowed its necessity: "These data, of course, are relevant only insofar as they help to explain the derivation of Rule 2A. The application of Rule 2A to the delegate selection procedures of any State is not in any way dependent on the pattern or history of voting behavior in that State." *Id.* at 118 n.19.

Not only did the *Jones* Court not do that, it cited *La Follette* repeatedly and relied on it for its holding. *Jones*, 530 U.S at 568, 573, 574-75, and especially 576; *see also id*. at 577 ("California's blanket primary violates the principles set forth in these cases. Proposition 198 forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival.").

In sum, *Jones* does not require evidence that unaffiliated voters have actually had an outcome determinative effect (either by the choice of nominee or candidate views), only that the mere existence of a substantial number of such voters creates such risks – a "clear and present danger" of such risks – to establish that a political party's associational rights are severely burdened. The evidence on that score in this case is undisputed. As applied, therefore, the fact that Proposition 108 forces the Party to allow unaffiliated voters to participate in the nomination of its candidates is alone sufficient to establish, as a matter of law, that the Party's associational rights are severely burdened, thereby subjecting the unaffiliated voter mandate to strict scrutiny. Because the Secretary offers no argument whatsoever regarding whether the mandate is narrowly tailored to further compelling interests, her Motion for Summary Judgement on the as-applied aspect of Count I not only fails, but the Party's cross-motion for Summary Judgment on this issue must be granted.[5]

b. In any event, the Party has offered likely *effects* evidence comparable to that referenced in *Jones*.

Even if this Court were to disagree with the Party's description of all the authority recited above and hold that *Jones* requires evidence of outcome determinative effects (either in the choice of candidate or in the positions espoused), the Party has offered evidence quite comparable to that

[5] Even if the Secretary had made such an argument, it would be unavailing, for the reasons articulated by the Party in its own Motion for Partial Summary Judgement. Dkt. #105 at 14-20.

which was referenced in *Jones*. The *Jones* Court noted that California's law was "[p]romoted largely as a measure that would 'weaken' party 'hard-liners' and ease the way for 'moderate problem-solvers,'" for example, citing the "ballot pamphlet distributed to voters." 530 U.S. at 570. The Party has offered the same, undisputed evidence here. PSUF 15 (citing Ex. 10, State Ballot Information Booklet). *Jones* also noted that "[t]he record also supports the obvious proposition that these substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from those of the party faithful. The 1997 survey of California voters revealed significantly different policy preferences between party members and primary voters who 'crossed over' from another party." 530 U.S. at 578-79 (citing Addendum to Mervin Field Report). The Party has offered similar survey evidence here, which demonstrated "a marked and measurable difference between the voting behavior and opinions of registered Republicans who vote in Republican primaries and registered Unaffiliated voters who participate in those same elections." PSUF 18 (citing Ex. L, Khalaf Rep. at 1, ¶ 3); *see also* Ex. 11, Colorado Polling Institute, *Survey of Likely 2024 General Election Voters* (Nov. 2023) (identifying statistically significant differences between Republican and Unaffiliated Voters on a wide range of issues); Expert Report of Secretary's Expert John Sides, at 6 (acknowledging that "independent voters who lean toward a political party … are not as partisan as the strongest partisans," and that in the Nationscape survey following the 2020 election, "93% of self-identified Republicans voted for Trump as did 80% of independents who lean Republican"—a dramatic difference). Def's MSJ, Dkt. 102, Ex. H, p. 6.

The Secretary takes issue with the Party's survey evidence "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." MSJ at 14 (emphasis added, and purportedly quoting *Jones*, 530 U.S. at 738, for the asserted

"holding" that "'forced association' exists where evidence demonstrates a 'clear and present danger of having a party's nominee determined by adherents of an opposing party.'"). Quite apart from the fact that there is no page 738 in the *Jones* opinion, which ends at page 603 in the U.S. reports, the precise quotation provided by the Secretary – "clear and present danger of having a party's nominee determined by adherents of an opposing party" – appears nowhere in the opinion. There is a close parallel, but it appears in the *dissent* by Justice Stevens, not the majority opinion. *See id.* at 599 (Stevens, J., dissenting (noting that the Court's conclusion of substantial burden "rests substantially upon the Court's claim that '[t]he evidence [before the District Court]' disclosed a 'clear and present danger' that a party's nominee may be determined by adherents of an opposing party."). It is therefore not a "holding." But even in this dissent, Justice Stevens speaks of a "danger" that the "nominee *may be determined*" by others, not of a danger that others "hav[e] … determined" the outcome, as the Secretary seems to suggest. *Id*. (emphasis added).

The actual quotation in the majority opinion to which Justice Stevens was referring appears at page 578: "The evidence in this case demonstrates that under California's blanket primary system, the *prospect* of having a party's nominee determined by adherents of an opposing party is far from remote—indeed, it is a clear and present danger." 530 U.S. at 578 (emphasis added). The evidence cited by the Court merely indicated a "prospect" of an outcome-determinative result, not that any result had actually occurred or been proved, or that such was required to demonstrate a severe burden on the party's associational rights. *Id.*; *see also id.* at 571 (the district court "recognized that [the injection of substantial numbers of voters unaffiliated with the party] *might* result in selection of a nominee different from the one party members would select, or at the least cause the same nominee to commit himself to different positions." (emphasis added)). And the evidence the Court relied on to establish that "prospect"—a survey of voters who *planned* to cross over and vote in another party's primary, 37% and 20% respectively—is actually weaker than the actual

evidence of significant levels of voting by unaffiliated voters in Republican primaries that is undisputed in this case. PSAUF 3.

Jones also cited expert evidence in support of the proposition that "Even when the person favored by a majority of the party members prevails, he will have prevailed by taking somewhat different positions—and, should he be elected, will continue to take somewhat different positions in order to be renominated." 530 U.S. at 579-80 (citing expert report of Elisabeth R. Gerber). Similar expert evidence has been offered here, by Tom Bjorklund (whose expertise the Secretary tries to downplay by describing him as merely the Party's Treasurer, but who is, in fact, also the founder and CEO of Tactical Data Solutions, Inc., which has provided election and voter data and/or data analytics to over 90 different candidates and organizations in Colorado alone since its founding in 2005). Bjorkund stated in his expert report that since 2016 (when Proposition 108 was adopted), "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." He also stated that "as more candidates vie for the Unaffiliated voter participation, the message is watered down away from Republican voters and toward Unaffiliated voters."[6]

[6] The Secretary further attempts to denigrate this expert evidence by asserting that it is "mere assertion" or "*ipse dixit* of the expert" because the "report cites no surveys, data, nor any empirical evidence or systematic evidence in support of this claim." MSJ at 15. But as the report makes clear, and as is further supported by his deposition testimony, Bjorklund's claim is based on his own personal experience advising campaigns; it is therefore a far cry from "mere assertion" and "*ipse dixit*." Bjorklund Report, Def's MSJ, Dkt. 102, Ex. P, at 2; Ex. 12, Bjorklund Depo. at, e.g., 45:7-10 (describing his "years of experience working with candidates, campaigns, predicting models of voter patterns" and then doing a "before and after" comparison to determine accuracy). The Secretary's claim that he does not cite "any empirical evidence," which is to say, evidence derived from observation or experiment, is therefore simply wrong. Indeed, Bjorklund's expertise is based on his own "knowledge, skill, and experience," Ex. P at 2, the very kind of alternative to academic credentials envisioned by Fed. R. Evid. 702. *See, e.g.*, My Cousin Vinny ((Twentieth Century Fox 1992) (qualification of expert witness based on experience); *Walsh v. New York City Hous. Auth.*, 828 F.3d 70, 91 (2d Cir. 2016) (noting that "film might … aptly be cited for the proposition that

Even under the Secretary's incorrect reading of *Jones*, the Party's evidence parallels what the Court found sufficient there.

c. The opt-out provision is not relevant to the Party's *as-applied* challenge.

The Secretary also contends that even if the unaffiliated mandate severely burdens the Party's associational rights, the Party's as-applied challenge fails because "the Party has the option to exclude those voters—and fully relieve any such burden—by opting out." MSJ at 16. The case cited by the Secretary for that proposition, *Utah Republican Party v. Cox*, 892 F.3d 1066, 1088 (10th Cir. 2018), makes no such claim, either at the page cited by the Secretary or elsewhere. Instead, as discussed at greater length in the Party's Motion for Partial Summary Judgement, Dkt. 105 at 7-9, the district court in that same case expressly held that the existence of viable alternative nomination processes that did not require political parties to include unaffiliated voters defeated a facial challenge, but not an as-applied challenge. *Utah Republican Party v. Herbert*, 144 F.Supp.3d 1263, 1280 (D. Utah 2015).[7] The court relied on the Fourth Circuit's decision in *Miller v. Brown*, noting that the "ability to choose saved the law in *Miller* from a facial challenge, but after the primary method was chosen, and the political party was forced to 'conduct a mandatory open primary for the selection of a party candidate,' the law did not survive an as-applied challenge." 144 F.Supp.3d at 1279 (quoting *Miller*, 503 F.3d at 368, 371).

II. The Party's *Facial* Freedom of Association Challenge to the Unaffiliated Voter Mandate Turns on Disputed Issues of Fact, and Is Therefore Inappropriate for Summary Judgment

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some individuals, such as Mona Lisa Vito, Vinny Gambini's fiancée who gained expertise in automotives and auto mechanics working in her father's garage, are well qualified despite a lack of formal credentials.").

[7] Unlike the supermajority-vote requirement of the Colorado opt-out provision at issue here, political parties in Utah could choose a nomination method closed to unaffiliated voters by simple majority vote. The viability of the opt-out choice here therefore presents a factual dispute, precluding summary judgment on the Party's facial challenge, that was not present in the Utah case.

The Secretary apparently concedes, as she must, that absent a realistic opt-out option, the unaffiliated voter mandate would impose a severe burden on the Party's associational rights and, under the Supreme Court's decision in *California Democratic Party v. Jones*, would be unconstitutional on its face. But whether the opt-out mechanism provided for by Proposition 108 is a realistic option is a hotly disputed issue of fact, precluding summary judgment either way on the Party's facial challenge.

For example, Kevin Lundberg, a long-time Republican party member and former Republican elected official, testified during the PI Hearing that, based on "the republican party's experience and also just a practical understanding of … volunteer run statewide organizations," his "analysis of the 75 percent rule is that it's written so that it is almost impossible" to achieve. "It's written to try to force parties into" the open primary. Ex. 8, PI Tr. at 201:24-202:3. The Party's expert, Trent England, likewise testified that the opt out is "designed to be very difficult." Ex. 8, PI Tr. at 228:25. And Dave Williams, party Chairman from 2023 to 2025 and a long-time member and former Republican elected official, testified that it wasn't even possible for the party to opt out in 2019 because not enough people attended the convention that year to achieve the three-fourths-of-total-membership threshold even if 100% of the attendees had voted in favor of the opt out. Ex. 8, PI Tr. at 32:6-18.

On the flip side, two of the Secretary's witnesses testified that the three-fourths threshold could be met. Richard Wadhams, Republican Party Chairman long before Proposition 108 was adopted, agreed that "the party could meet this 75 percent opt-out threshold if the political will was present." Ex. 8, PI Tr. at 371:23-25. Similarly, Suzanne Taheri, Colorado Deputy Secretary of State from 2011 to 2018 who only became a Republican in 2008, changing her registration from unaffiliated so that she could vote in the Republican primary, responded "Yes" to a question whether "the party can reach the 75 percent threshold if enough people agree on an issue." She

also agreed that there have been votes other than opt-out votes that exceeded a 75% threshold, adding that "routinely there is a consensus to do certain party activities." Ex. 8, PI Tr. at 245:12-19. She also testified that the opt-out votes have never reached the 75% threshold, however. *Id*. at 245:2-4.

The Secretary herself has admitted that no major party as *ever* succeeded in achieving the supermajority required to opt out of the semi-open primary, an unprecedented three-fourths of the entire membership, not just three-fourths of those present and voting. DSUF No. 14; *see also* DSUF Nos. 15-18. She has also admitted that amendments to the Party bylaws "are difficult to pass" because they require a two-thirds vote of members present and voting (significantly lower than the opt-out requirement of three-fourths of total membership). DSUF No. 20.

Moreover, the Secretary's own asserted interests in "stability" and "increasing voter participation" presume that the supermajority voter necessary to opt out of the semi-open primary will never be achieved. As Kevin Lundberg testified during the PI hearing, the opt-provision operates like a button instead of a switch. Ex. 8, PI Tr. at 182:18-24. Even if the 75% threshold is achieved in one election cycle, the default resorts to the open primary the following election cycle unless that supermajority threshold is met at the outset of that election cycle. *Id.*; *see also* Colo. Rev. Stat. Ann. § 1-4-702(1) (requiring the opt-out vote before October 1 "of the year preceding the year in which an assembly or convention is to be used"). The Secretary's asserted interest in "stability," therefore, presumes that the opt-out threshold will never be achieved.

The same is true with the Secretary's asserted interest in increasing voter participation. The alternatives allowed by the opt-out provision, if it could realistically ever be achieved, would dramatically reduce voter participation in the selection of the Party's nominees to a relative handful of party activists willing and able to participate in the Party Convention or Assembly process. The State's witness, Richard Wadhams, testified that, based on his own prior experience as party chair,

he did not believe it was even possible for the Party to conduct its own primary election (in which all registered Republicans would be eligible to participate), leaving a convention where only "some 4,000 … people would then be deciding the republican nominee, not the entire universe of republican voters." Ex. 8, PI Tr. at 377:21-378:6. The Secretary's asserted interest in increased voter participation therefore presumes that the opt out is never achieved.

The Secretary claims that the Party could make several changes to its internal rules that would, in her view, make it easier to achieve the opt-out supermajority. The Party could limit or expand the Committee's total membership (after satisfying the statutory minimum requirements) and even select the Committee members itself; it could control when, where, and how Committee meetings are held; it could determine the quorum required to conduct meetings; and it could determine the method of conducting the opt-out vote. MSJ at 11-12. Suzanne Taheri also testified that she "supposed" the Party could make attendance mandatory, and "could kick people off if they don't attend." Ex. 8, PI Tr. at 250:8-10.[8] Although making it easier to attend meetings, or even mandating attendance, would avoid the problem that occurred in 2019 when the 75%-of-total-membership threshold could not be met even if 100% of the attendees voted for the opt-out, it is not at all evident how those changes, or any of the other changes suggested by the Secretary, would facilitate achieving a supermajority vote. When asked about whether the Party's Central Committee could "change its definition of a quorum to help ensure that it could meet the 75 percent threshold," for example, the Secretary's own witness acknowledge that the Party "could change what the quorum is," but she didn't know "whether it would help them meet the threshold or not." Ex. 8, PI Tr. at 246:16-20.

[8] Even assuming procedural changes could help meet the opt-out threshold, *Miller* holds that a political party cannot be required to undertake extraordinary internal maneuvers merely to vindicate its constitutional rights. 503 F.3d at 370."

Moreover, the Secretary is simply wrong to suggest that the Party has any authority to significantly limit the number of party members, or to choose who those members are. C.R.S. § 1-3-103 mandates a large list of people who "shall" be on the State Central committee, including the Chair and Vice-Chair of each county central committee and any Republican officeholders in statewide and legislative offices. It also mandates an additional two members from each county for each 10,000 voters who voted in that county at the last general election. To be sure, the Statute allows the Party, through its bylaws, to include "additional members," but as Dave Williams testified during the PI Hearing, eliminating everyone other than what the state law required would yield "roughly 11 less members." Ex. 8, PI Tr. at 43:10-18.

In any event, the fact that the supermajority threshold has *never* been achieved, and that the Secretary's own asserted interests in "stability" and "increased voter participation" presume that it won't be achieved, strongly favor the Party's position that the opt-out threshold imposes a significant burden on it. Nevertheless, whether the supermajority vote requirement of the opt-out provision is "nearly impossible to achieve" or "very difficult," as the Party's witnesses testified, "difficult to pass," as the Secretary has admitted, or merely something that "could" be met "if the political will was present," as the Secretary's witnesses testified, presents a material factual dispute that precludes summary judgment.[9]

III. The Secretary Makes No Argument that Her Asserted Interests Are Compelling, or that the Unaffiliated Voter Mandate is Narrowly Tailored to Further Those Interests, But Her Asserted Interests Fail Even Lesser Scrutiny.

[9] There is no factual dispute, however, about whether the supermajority requirement unconstitutionally intrudes on the Party's internal affairs, as alleged in Count II. The Secretary's claim that it does not rests on a single district court decision out of South Carolina and is otherwise merely *ipse dixit*. MSJ at 11-12. The Party contends that *Greenville* is not compatible with the Supreme Court's decision in *Eu*, which held that "Freedom of Association … encompasses a political party's decisions about … the process for electing, its leaders." *Eu*, 489 U.S. at 229. Accordingly, and for the reasons set out in Section III of the Party's Motion for Partial Summary Judgment, Summary Judgement on this Count should be granted to the Party.

In her Motion for Summary Judgement, the Secretary asserts only two governmental interests, apparently withdrawing other interests that she asserted previously at the preliminary injunction phase. But as the Supreme Court has previously held, the interest in increasing voter participation is not a compelling interest. *Jones*, 530 U.S. at 584-85. And the "stability" of which the Secretary speaks—guaranteeing that unaffiliated voters will regularly and predictably be able to participate in the Party's primary election—is not the kind of "stability of [the State's] political systems" that was addressed in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), which dealt with Minnesota's ban on "fusion" candidates (and was not analyzed under strict scrutiny, in any event). It is, rather, like the interest in promoting fairness by allowing non-party members to participate in a Party's choice of its nominees, an interest also rejected in *Jones*. *Jones*, 530 U.S. at 584. The unaffiliated mandate is not narrowly tailored to further either of these interests, in any event.

But even if some lesser level of scrutiny were to be applied, the Secretary's claim about its interest in increasing voter participation is flawed. She asserts that "[c]losing the major parties' primaries to [the nearly two million unaffiliated Colorado 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." MSJ at 17-18. That's not true, of course, as Colorado law permits any voter—whether unaffiliated or a member of an opposing party—to re-register as a party member up until the close of polls on election day in order to participate in that party's primary election. C.R.S. § 1-2-201(3)(a), (b)(V). The Supreme Court in *Jones* rejected the very contention that the Secretary has advanced here, noting that the "voter who feels himself disenfranchised should simply join the party." *Jones*, 530 U.S. at 584. "That may put him to a hard choice," the Court added, "but it is not a state-imposed restriction upon *his* freedom of association, whereas compelling party members to accept his selection of their nominee *is* a state-imposed

restriction upon theirs." *Id.*

Moreover, the Secretary's statistical evidence is less significant that it appears. Of course the number of voters participating in primary elections would increase when nearly 2 million additional voters are made eligible to vote in those primaries. PSAUF 1. But as the Secretary's own voter data demonstrates, the rate of participation in primary elections, when calculated against the pool of voters who were eligible to vote, was *about the same* in 2018 as in 2016—35.12% versus 34.8% as a percent of active registered voters, and 30.39% versus 29.9% as a percent of total registered voters. PSAUF 2. The slight increase of less than one-half of one percentage point hardly justifies the severe burden on the Party's associational rights. Worse, total primary turnout has actually *declined* by nearly 4½ percentage points since its initial bump up in the immediate wake of Proposition 108's adoption. PSAUF 4.

Finally, as noted above, both increased voter participation and stability are only achieved if the Party never opts out of the open primary. That simply undercuts the Secretary's claim that the opt-out is a viable option for the Party.

IV. The Party Will Move to Dismiss Its Compelled Speech Claim

The Party acknowledges that direct evidence showing the open primary has altered its nominee selection is unavailable, largely due to the anonymity of the ballot. See England Depo. at 81:12–82:16 (State's MSJ Ex. I). While the claim could be supported by circumstantial or expert opinion evidence of the kind referenced in *Jones*, resolving such disputes would require trial. Because Count III seeks the same remedy as Count I and turns on overlapping factual issues, the Party will move to dismiss it to narrow and streamline the case.

V. The Party Will Also Move to Dismiss Counts IV and V.

The Secretary contends that the concept of vote dilution "simply doesn't apply here," relying on cases like *Reynolds v. Sims* and *Navajo Nation v. San Juan County* to suggest that dilution

occurs only through malapportionment or racial gerrymandering. But those cases do not define the outer limits of vote dilution claims. Other courts have recognized that including ineligible or improperly authorized voters can unconstitutionally dilute the votes of qualified electors. See *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994) (addressing inclusion of non-voting delegates in the Committee of the Whole); see also *Virginia Coalition for Immigrant Rights v. Beals*, No. 1:24-cv-01778, Dkt. #92 at 44 (E.D. Va. 2024) (arguing that restoring noncitizens to voting rolls would "dilute the votes of actual citizens"), stay granted, *Beals v. Va. Coal. for Immigrant Rights*, 2024 WL 4608863 (Oct. 30, 2024).

Nevertheless, because Counts IV and V seek the same remedy as Count I and turn on the same core constitutional question—whether the forced inclusion of unaffiliated voters in the Party's nomination process is lawful—the Party will move to dismiss both counts to narrow and streamline the issues before the Court.

CONCLUSION

The Secretary's motion for summary judgement with respect to the *as-applied* challenges in Counts I and II should be denied, and summary judgment granted instead to the Party. The Secretary's motion for with respect to the *facial* challenges in Counts I and II should be denied because there are material facts in dispute for those challenges.

Respectfully Submitted,

Signed this 25th day of April 2025.

/s/ Alexander Haberbush
Alexander Haberbush
CONSTITUTIONAL COUNSEL GROUP
444 W Ocean Boulevard, Suite 1403
Long Beach, CA 90802
Telephone: (562) 435-9062
E-mail: ahaberbush@ccg1776.com

Randy B. Corporon
LAW OFFICES OF RANDY B. CORPORON P.C.
5445 DTC Parkway, Suite 825
Greenwood Village, CO 80111
Telephone: (303) 749-0062
E-mail: rbc@corporonlaw.com

Attorneys for Plaintiff