No. 18-450

IN THE

Supreme Court of the United States

UTAH REPUBLICAN PARTY, PETITIONER,

v.

SPENCER J. COX, ET AL., RESPONDENTS.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PRIVATE CITIZEN, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Private Citizen is a public benefit corporation established in 2015 for the purpose of advancing civil rights and First Amendment issues. Private Citizen defends the civil rights of individuals and groups through public education and litigation. It supports challenges to unjust and unconstitutional laws, regulations, and enforcement, often in areas involving political speech and expression.

SUMMARY OF ARGUMENT

More than three decades ago, in *Tashjian v. Republican Party of Connecticut*, this Court acknowledged that the First Amendment's freedom of association protects individual members as well as the organized association itself: "Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."[2] Soon after, the Court explained that the associational freedom enjoyed by the association is not merely the sum of the individual members' associational freedoms, but contains unique elements. In *Eu v. San Francisco County Democratic*

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. Both parties' counsel of record received timely notice of the intent to file the brief under Rule 37. Petitioner filed a blanket notice of consent with the Clerk. Pursuant to this Court's Rule 37.3(a), a letter from Respondent consenting to the filing of this brief has been submitted to the Clerk.

[2] 479 U.S. 209, 215 (1986) (quotation and citation omitted).

Central Committee,[3] the Court reiterated the existence of a political party's own right to expressive association by distinguishing between an individual's freedom to associate with a political party and the party's own freedoms—including the freedoms to choose how to organize itself, conduct its affairs, and select its leaders. The Court has since consistently treated expressive associations as holding institutional First Amendment rights distinct from the rights of individual members.

The Court employed this framework without incident in *Tashjian* and *Eu*, as well as *American Party of Texas v. White*,[4] *California Democratic Party v. Jones*,[5] and *New York State Board of Elections v. Lopes Torres*.[6] In *White*, the Court held that a Texas law restricting access to the general election ballot was not unduly burdensome; *White* stated in dicta that 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."[7] Then, in *Jones*, the Court held that a California law requiring participation in a "blanket" primary violated a party's First Amendment rights; *Jones* noted in dicta that "a state may require parties to use the primary format for selecting their nominees, in order to

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[3] 489 U.S. 214, 224 (1989).

[4] 415 U.S. 767 (1974).

[5] 530 U.S. 567 (2000).

[6] 552 U.S. 196 (2008).

[7] 415 U.S. at 781.

assure that intraparty competition is resolved in a democratic fashion."[8] Finally, in *Lopez Torres*, the Court held, *inter alia*, that a state's power to prescribe party use of primaries or conventions is not unlimited; *Lopez Torres* noted in dicta that "[t]o be sure, we have . . . permitted States to set their faces against 'party bosses' by requiring party-candidate selection through processes more favorable to insurgents, such as primaries."[9]

The holdings in *White*, *Jones*, and *Lopez Torres* did not require any nuanced analysis of the distinction between individual and institutional rights of expressive association. But each case did contain one or more passing generalizations about the freedom of political association, such as a preference for candidate selection procedures that prohibit abuse by "party bosses." These comments, if taken as absolute truth, would surely prove false in numerous instances. For example, if *Lopez Torres* truly set forth an absolute preference for popular control of a political party's candidate selection process—as opposed to any procedure that gives party representatives more control—the government's ability to severely burden a political party's candidate selection has few limits.

The Court's passing statements in *White*, *Jones*, and *Lopez Torres* led the Tenth Circuit astray. The panel interpreted this trifecta of cases as providing license for a lower court to ignore the burden on a

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[8] 530 U.S. at 572.

[9] 552 U.S. at 205.

political party's institutional rights and focus only on the injury suffered by individual members. To be sure, *White*, *Jones*, and *Lopez Torres* each describe a way in which a state may permissibly alter a party's candidate nomination process. But none of these precedents license lower courts to mischaracterize or ignore a political party's claim of a severe institutional First Amendment injury.

The decision below also highlights a significant danger lurking for all expressive associations. If lower courts are permitted to entirely ignore the institutional First Amendment injury suffered by an expressive association—instead focusing only on the rights of individual members—expressive associations of all stripes will suffer. State actors will be free to impose any rule on an expressive association that purportedly makes the association more democratic or "responsive" to its members. State actors might even prevent members of an expressive association from making "undemocratic" rules that limit the decisionmaking of a majority of future members. *Amicus* respectfully suggests that case presents an ideal vehicle to clarify the First and Fourteenth Amendment rights vested in expressive associations as institutions to strengthen and preserve their values, or, as here, select their standard-bearers of choice. As shown in Part I below, the Tenth Circuit misconceived the nature of the right of association and, in turn, the character and magnitude of the injury to the association. That misconception has wide-reaching effects, impacting all expressive associations—as discussed in Part II below. Clarifying the institutional nature of an

expressive association's freedom of association will protect the constitutional rights of all forms of expressive associations. For these reasons, *amicus* respectfully suggests that the petition be granted.

ARGUMENT

I. The Tenth Circuit misconceived the nature of the right of association and, consequently, the character and magnitude of the injury to be weighed against the state interest.

The analytical framework courts use to evaluate a challenge to a state election law is well-worn. A challenges to state election law requires a court to "weigh the character and magnitude of the asserted injury to the [plaintiff's] rights protected by the First and Fourteenth Amendments" against the "precise interests put forward by the State as justification for the burden imposed by its rule." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The "rigorousness" of the inquiry "depends on the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* When "rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Id.* (quotation omitted). By contrast, "important regulatory interests are generally sufficient to justify" lesser, reasonable and nondiscriminatory restrictions. *Id.* (quotation omitted). Thus, correctly identifying the magnitude of the First Amendment injury or injuries is paramount; it will often be decisive.

A. Freedom of association is enjoyed by the association as an institution, not only its individual members.

It is beyond dispute that an expressive association holds First Amendment rights as an institution, and that those rights are not merely vested in its individual members. This Court has distinguished an expressive association's First Amendment rights from those of its individual members for decades. For example, "[f]reedom of association means not only that an individual voter has the right to associate with the political party of her choice . . . but also that a political party has the right to 'identify the people who constitute the association.'" *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986)). That distinction has since been affirmed. *See, e.g.*, *New York State Bd. of Elections v. Lopez Torres*, 522 U.S. 196, 203-204 (2008) (alternately discussing First Amendment rights of the party itself and individual members of the party); *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring).

When evaluating the First Amendment rights of expressive associations, this Court relies on institutional aspects of the association. It has focused on the group's "internal structure or affairs." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *accord Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). It has also focused on an association's formal expressions of creed or policy regarding their

particular, collective viewpoint. *See Roberts*, 468 U.S. at 618, 627; *Boy Scouts of Am.*, 530 U.S. at 651-53. Further, the Court acknowledges an association's right to exclude. *See Boy Scouts of Am.*, 530 U.S. at 655, 675. The right to exclude is a corollary of an association's right to define and preserve its membership and expressive message. Moreover, the right to exclude is uniquely expressed and enforced by the entity itself, often through official institutional policy, even if some members disagree. These aspects of an association exist to express and preserve the principles and viewpoints around which the members associated in the first place. They create an institutional "superstructure"[10] of the association and manifest important features of a collective that transcend any individual member, or even a majority of members at any particular moment in time.

The Court's decisions rely on those institutional aspects of the First Amendment in expressive association cases. Those decisions identify beyond doubt that expressive associations have institutional First Amendment rights. However, the Tenth Circuit majority failed to acknowledge the right of an expressive association to preserve its institutions. Consequently, the panel found that the harm suffered should be measured only by the degree to which the challenged law diverged from the

[10] Judge Tymkovich's dissent aptly noted this reality by stating that "[t]he superstructure of the [association]—its bylaws, customs, and leadership—are protected by the first amendment too." *Utah Rep. Party v. Cox*, 892 F.3d 1066, 1105 (10th Cir. 2018) (Judge Tymkovich, dissenting).

predicted desires of individual association members—and the URP's institutional rights were wholly disregarded.

B. The Tenth Circuit's misconception of the nature of the right materially alters the character and magnitude of the injury to be balanced against state interests.

Courts cannot reliably weigh the nature and gravity of a First Amendment injury unless they have first defined the contours of the right itself. Who holds the constitutionally-protected right, what does that right secure, and how did the protected party suffer an injury-in-fact? Was the injury caused by the defendant's violation of the right, and is it redressable by judicial action? A doctrine that answers these threshold questions incorrectly will cause courts to either leave the actual litigants' injuries wholly unaddressed, or perhaps worse, to adjudicate controversies that are not properly presented or do not exist.

Here, the Tenth Circuit committed precisely this type of error when it improperly defined the injury and the party injured. It wholly failed to acknowledge the URP's institutional First Amendment rights, causing it to mischaracterize the injury at issue. The court explicitly acknowledged that it viewed its task as analyzing "SB54's burdens on . . . the group of like-minded individuals [constituting the party] . . . rather than just the leadership of the party." *Utah Republican Party*, 892 F.3d 1066, 1081 (10th Cir. 2018). That position is

contrary to this Court's precedent. The URP enjoys First Amendment protections as an institution independent of its individual members' rights.

The Tenth Circuit's misconception is perhaps most evident in its rejection of the URP's final argument: that the regulation "leaves the party vulnerable to being saddled with a nominee with whom it does not agree." *Id.* at 1080. The court reasoned that the party would not suffer such harm because its candidate would be supported by at least a plurality of voters claiming affiliation with the party during the primary. *Id.* at 1080–81. In other words, the party would not suffer such harm because its individual members would not suffer such harm.

Under that analysis, an expressive association could not assert a First Amendment injury distinct from its membership. Rather, injury could be asserted only by reference to the burden on its individual members, however that may be defined. Additionally, the Tenth Circuit conflated a party primary with the actual will of party members, despite that a majority of party members might not participate in the primary at all.

Further, failing to acknowledge the institutional right likewise fails to adequately identify the character and magnitude of the harm at issue. *See Burdick*, 504 U.S. at 434. An expressive association is vested with First Amendment rights—and the nature of injuries the association can suffer as an institution differ from those suffered by individual members. For example, a regulation that invades the

association's bylaws may cause a very different injury than one that affects the ability of an individual to become a member of the association for the purpose of altering its message.

Additionally, the character and nature of the injury determine the scrutiny applied to the regulation at issue. The character of the burden determines the scrutiny applied to the state interest in the balancing test. *See Burdick*, 504 U.S. at 434; *Boy Scouts of Am.*, 530 U.S. at 653. To date, the Court has identified restrictions that harm an association's internal processes as severe burdens that can be justified only by a regulation that is "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. But other restrictions are considered lesser burdens that are justifiable by only "important regulatory interests." *Id.* Thus, incorrectly characterizing the nature and magnitude of the harm can materially alter the constitutional test applied.

By mischaracterizing the First Amendment right as one held only by individual members—or perhaps, alternatively only by individual members and party leadership—the Tenth Circuit incorrectly found that the harm here was minimal. *Utah Republican Party*, 892 F.3d at 1083. That finding affords greater deference to the state interest at issue and materially alters the First Amendment analysis. *See id.* at 1077-79. In this case, it permitted the Tenth Circuit to bless a state law demanding a primary that may result in the nomination of a candidate with whom a majority of the voting party members

disagree. The Tenth Circuit ignored the severe burden this imposes on the party as an institution.

The Tenth Circuit justified its position by framing the issue as a dispute about who the party's decision-makers are: the individual party members, or the party leadership. *Id.* at 1080-81. But even that question does not implicate merely an individual member's right to association. That question essentially asks who makes decisions about the party's outward expressions—such as the selection of a standard-bearer to display the party's ideological platform. Those decisions do not rest with the individual members in their individual capacities. Rather, that right is held by the collective—the institution. Individual members may well participate in making these decisions in accordance with the organization's internal rules. But the ultimate decisions are reached as and by the collective to help ensure the like-mindedness of the institution's outward expressions. *See Boy Scouts of Am.*, 530 U.S. at 655. Those decisions regarding decision-making authority are often expressed in bylaws or customs. They are internal process questions endemic to the association's institutional nature.

The Tenth Circuit's decision was built on a now-familiar line of cases from this Court. *See Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974); *Cal. Democratic Pty. v. Jones*, 530 U.S. 567, 572-73 (2000); *N.Y. Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 205 (2008). Those cases found little occasion to consider the institutional First Amendment rights of expressive associations enjoy.

However, the opinion below demonstrates how passing statements in each case can be erroneously applied to undermine the First Amendment by skewing the relevant legal test in favor of state interests.

II. The adverse effects of the Tenth Circuit's holding are far-reaching.

The First Amendment right of association analysis is not entirely unique to political parties; all such analyses require characterization of the harm alleged to determine what level of scrutiny will be applied to the state interest in a balancing test—and how that balance weighs out. Left unchecked, the Tenth Circuit's new standard will adversely affect countless expressive associations by foreclosing consideration of their institutional rights—and even perhaps their standing—under the First Amendment. The Tenth Circuit's characterization of the First Amendment as protecting only the sum of individual preferences of members will affect advocacy groups of all viewpoints and structures: membership corporations, unions, and associations. It should come as no surprise when states use these same rules to substantively alter the message or type of speech that each group presents to the public. This case presents an example of the state enabling an insurgent faction to overpower the voice[11] of the

[11] It is important to recall that SB54's purpose is to empower insurgent factions purporting to affiliate with the URP to overthrow the institution's principles in favor of more moderate candidates—a substantive change in the association's expressed viewpoint.

institutional association—ultimately transmuting its message. But the panel's decision below would open the door to significant state regulation of political speech, such as a rule that an expressive association shall not support any candidate unless the decision is ratified by a majority of the members.

This case presents a unique opportunity for the Court to stem the coming tide of state regulation that denies the existence of institutional expressive association rights distinct from the rights of individual members. *Cf. Dale*, 530 U.S. at 644 (recognizing that an organization enjoys expressive association rights distinct from the rights of its individual members); *Montano v. Lefkowitz*, 575 F.2d 378, 386 (2d Cir. 1978) ("We recognize . . . that the party itself has an interest in the choice of a candidate . . . ."). Expressive associations speak in many ways, including through the rules that govern the association. *Democratic Party of U.S. v. Wisc. ex rel. La Follette*, 450 U.S. 107, 124 n.26 (1981) (quoting *Ripon Soc'y, Inc. v. Nat'l Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1974) (en banc)). Because this case concerns a political party's candidate nomination procedure, both the rules that govern the expressive association and the state law at issue are clearly defined and amenable to review.

In many cases, the mere act of determining whether a group's association rights have been violated is less clear, and therefore subject to debate. *Cf. Dale*, 530 U.S. at 651 (accepting briefing and a decades-old "position statement" as a statement of a group's position on what would impair expressive

association). While courts must "give deference to an association's view of what would impair its expression," *Id.* at 653, this case leaves no room for doubt about the URP's institutional interest in expressive association. Similarly, the nature of state action impairing the URP's institutional interest — here, a law mandating a particular party nomination method—is clear and definite. Other forms of state regulation, often done by administrative officials, are comparatively malleable and less susceptible to thorough review.

Perhaps tellingly, on rehearing, the Tenth Circuit purported to cabin the effects of its decision by adding a footnote disclaiming the rationale employed by the panel in "other associational nominating decisions." *Utah Republican Party*, 892 F.3d at 1094 n.29.[12] Despite this footnote disclaimer, the decision below will bind lower courts in the Tenth Circuit when analyzing the First Amendment burden on any expressive association.

Just as disregarding the institutional nature of First Amendment rights materially altered the outcome below, doing so as to other types of expressive associations will often result in improperly characterized harm that, in turn, results in less-than-constitutional scrutiny applied to the regulation at issue. Such a finding could permit a minority of those claiming affiliation with an

[12] "Of course, our decision addresses only the issues presented to us. We do not address the reach of governmental power to regulate other associational nominating decisions."

association to dictate its advocacy in furtherance of a merely "important" state interest, in a manner fundamentally at odds with the First Amendment.

The Tenth Circuit's decision erodes individual freedoms by limiting the manner in which an individual can associate and express himself or herself through a collective of other individuals. The State of Utah may disagree with the wisdom of the URP choosing a candidate selection process that relies on individual members electing a caucus delegate who ultimately selects the party's nominee.[13] But Utah or any other state which wishes to significantly infringe on an expressive association's autonomy must satisfy the rigorous demands of strict scrutiny.

CONCLUSION

The Court should grant URP's petition. The Tenth Circuit's decision is contrary to Supreme Court precedent clearly distinguishing an association's institutional First Amendment rights from those of its individual members, and this case presents an excellent vehicle to resolve this First Amendment question important to all expressive associations because the Tenth Circuit's flawed rationale was influenced by a string of passing statements in Supreme Court cases that can be clarified to rectify the confusion.

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[13] *Cf.* U.S. Const. Art. II, §§ 1–3 (setting forth the manner by which the offices of President and Vice President were originally chosen by an electoral college comprised of members appointed by each state).

Respectfully submitted,

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