No. 18- _______

In the Supreme Court of the United States

UTAH REPUBLICAN PARTY, PETITIONER,

v.

SPENCER J. COX, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As a private expressive association, "[a] political party" enjoys a general First Amendment right "to choose a candidate-selection process that will in *its* view produce the nominee who best represents its political platform." *N.Y. Bd. Of Elections* v. *Lopez Torres*, 552 U.S. 196, 202 (2008). The First Amendment thus gives "special protection" to "the process by which a political party selects a standard bearer" *California Democratic Party* v. *Jones,* 530 U.S. 567, 575 (2000). Here, however, the Tenth Circuit has joined the Ninth in permitting a government to force a political party to select candidates through a primary rather than a caucus system, for the viewpoint-based purpose of avoiding candidates with "extreme views."

The questions presented are:

1. Does the First Amendment permit a government to compel a political party to use a state-preferred process for selecting a party's standard-bearers for a general election, not to prevent discrimination or unfairness, but to alter the predicted viewpoints of those standard-bearers?

2. When evaluating the First Amendment burden of a law affecting expressive associations, may a court consider only the impact on the association's members, instead of analyzing the burden on the association itself, as defined by its own organizational structure?

LIST OF PARTIES

The names of the parties are listed on the cover, excepting the Utah Democratic Party, which was an intervenor below and cross-appealed to the Tenth Circuit and is thus a Respondent here. Respondent Spencer J. Cox is a Respondent only in his official capacity as Lieutenant Governor of Utah.

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INTRODUCTION

For at least the last half-century, this Court has virtually always stepped in when a government attempts to interfere with a political party's autonomy—even though such cases rarely involve a conflict among the lower courts. This Court's willingness to do so reflects, first, a recognition that "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views," and that party autonomy is essential to citizens' ability to "band together" for that purpose. *California Democratic Party* v. *Jones,* 530 U.S. 567, 574–575 (2000). The Court's willingness to grant review in such cases also reflects a recognition that a single law that intrudes upon party autonomy may not only determine the political rights and opportunities of hundreds of thousands—or millions—of voters, but may also dramatically influence the laws enacted by governments within the affected jurisdiction.

This is such a case. Here, a group that disagreed with the views of candidates nominated by the Utah Republican Party persuaded the legislature to enact a law—known as SB54—expressly designed to influence the Party to nominate less "extreme" candidates. The law accomplished that objective by effectively forcing the Party—as a condition of having its nominees listed on the general election ballot—to accept as Republican "nominees" candidates who flout the neighborhood caucus-convention nominating system that has long been a central feature of the Party's bylaws.

The legislature did so, moreover, in the face of this Court's consistent teaching that "the First Amend-

ment reserves" a "special place *** and *** special protection" for the internal "process by which a political party 'select[s] a standard bearer ***." *Id.* at 575. Indeed, this Court has emphasized that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Ibid.* For those reasons, the Court has consistently held that, subject only to non-discrimination and fairness requirements, "[a] political party has a First Amendment *right*" "to choose a candidate-selection process that will in *its* view produce the nominee who best represents its political platform." *N.Y. Bd. Of Elections* v. *Lopez Torres*, 552 U.S. 196, 202 (2008) (emphasis added).

Nevertheless, in a two-to-one decision, the Tenth Circuit upheld SB54 against the Party's First Amendment challenge, based upon what the majority called "considered dicta" originating in this Court's decision in *American Party of Texas* v. *White*, 415 U.S. 767, 781 (1974). Disagreeing with his colleagues' reading of those dicta, Chief Judge Tymkovich dissented—and in so doing urged this Court to adhere to its long-standing practice of granting review in cases implicating political parties' associational rights.

OPINIONS BELOW

The Tenth Circuit's decision is published at 885 F.3d 1219 and reprinted at 1a. The order denying rehearing *en banc* is published at 892 F.3d 1066 and reprinted at 97a. The district court's opinion granting summary judgment to respondent is published at 178 F. Supp. 3d 1150 and reprinted at 101a.

JURISDICTION

The Tenth Circuit issued its decision on March 20, 2018. Rehearing *en banc* was denied on June 8, 2018, making this petition due on September 6, 2018. Justice Sotomayor granted an extension to October 8, 2018, which is Columbus Day, making the petition due on October 9, 2018. See Rule 30.1. This Court has jurisdiction under 28 U.S.C.1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides: "Congress shall make no law *** abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."

The "Either or Both" provision of SB54, codified at Utah Code 20A-9-101 is as follows:

(12) "Qualified political party" means a registered political party that:

(a) (i) permits a delegate for the registered political party to vote on a candidate nomination in the registered political party's convention remotely; [and] ***

(c) permits a member of the registered political party to seek the registered political party's nomination for any elective office by the member choosing to seek the nomination by either or both of the following methods:

(i) seeking the nomination through the registered political party's convention process, in accordance with the provisions of Section 20A-9-407; or (ii) seeking the nomination by collecting signatures, in accordance with the provisions of Section 20A-9-408 ***

STATEMENT

A. Legal framework

This Court has consistently held that political parties are *private* expressive associations entitled to the First Amendment freedom of expressive association. *E.g., Jones*, 530 U.S. at 573. The Court has further explained that enforcement of this freedom is especially important in "the process of selecting [a party's] nominee." *Id.* at 575. That is because:

- the party's nominee selection process "determines the party's positions on the most significant public policy issues of the day,"
- "the nominee [] becomes the party's ambassador to the general electorate in winning it over to the party's views," and
- the nominee can become "virtually inseparable" from the party.

Ibid.

Indeed, this Court has said that "a party's choice of a candidate is the most effective way in which the party can communicate to the voters what the party represents and, thereby, attract voter interest and support." *Ibid.* (quoting *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 372 (1997) (Stevens, J., dissenting)). Accordingly, except where necessary to avoid discrimination or unfairness, "[a] political party has a First Amendment right" "to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform." *Lopez Torres*, 552 U.S. at 202.

Under the so-called *Anderson-Burdick* test, this Court applies strict scrutiny to severe burdens on a party's autonomy, but rational basis review to "only

modest burdens." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 452 (2008); see also *Anderson* v. *Celebrezze*, 460 US. 780, 789 (1983); *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992). Thus, laws that impose a severe burden on party autonomy—like the one struck down in *Jones*—receive strict scrutiny. See *Jones*, 530 U.S. at 585.

B. SB54 and the Party's caucus-convention system

The problem at the heart of this case is that the Utah legislature has manipulated the way in which the Utah Republican Party chooses its candidates in order to alter the likely viewpoints of those candidates.

1. For virtually its entire history, the Party has selected candidates through a democratic neighborhood caucus and convention system. That system allows *all* Party members to have a meaningful voice in deciding who will represent the Party in the general election.

Every election cycle, Party members in each neighborhood gather in a caucus meeting, which is open to the public. The caucuses elect delegates to vet each candidate on behalf of the neighborhood, and to represent the neighborhood in selecting the Party's candidates—or narrowing the field to two candidates—at a subsequent nominating convention.[1] Until 2014, Utah law accommodated the Party's caucus-convention sys-

[1] Party leadership is elected by those neighborhood delegates the following year at county and state organizing conventions: County delegates elect the State Central Committee—"the governing and policy-making body of the Party," while state delegates elect the state Party officers. Utah Republican Party 2013 Constitution arts. IV, XII § 7.D.

tem by allowing a political party to field general-election candidates through either that system, an ordinary primary election, or some combination. See Utah Code 20A-9-403 (2013).

Dissatisfied with some of the candidates the neighborhood caucus system had produced, a group known as Count My Vote sought to change the selection system. The group first urged the Party itself to eliminate the caucus-convention system in favor of a primary. When this failed, the group proposed a ballot initiative to the same effect. The group then went to the Utah legislature, which passed a bill, SB54, that "incorporated almost the entire language, verbatim, of Count My Vote's ballot initiative." JA 60. While SB54 kept the caucus-convention system as a purported option alongside Count My Vote's reforms, it required—in its "Either or Both" provision—that any party wishing to keep a caucus system also allow party members to get on the primary ballot by gathering signatures.

2. The record explains that "the stated purpose of the Count My Vote efforts was to change the Utah election code for the purpose of affecting the *message* * * * [of] the Utah Republican Party in its chosen candidate selection process." Utah Republican Party Supplemental Appendix 70 (10th Cir. Dec.12, 2016) (emphasis added) (declaration of Party Chairman James Evans) . Indeed, "Count My Vote promised" that if enacted, its proposal would "cause the Party to nominate candidates with less 'extreme views.'" *Id.* at 72. The evident purpose of Count My Vote and SB54 was thus to change the views and messages of the Party and its candidates. See also, *e.g.*, Pet. 66a n. 9, 69a n. 12, 80a n. 20, and accompanying text (Tymkovich, J., dissenting).

In response, the Utah legislature was candid in describing the purposes of SB54 to include reducing the prospect that the Party would select candidates that Count My Vote labeled "extreme," and enhancing the prospects of nominees with "competing philosophies."[2]

To achieve its viewpoint-altering goals, SB54 removed the candidate-selection flexibility that Utah law previously allowed. Instead, as a condition of access to the general election ballot, SB54 limited parties' candidate selection processes to only two paths, one of which would eliminate the caucus-convention system altogether, and the other of which would sharply limit that system's influence in the ultimate selection of a party's candidates.

Specifically, SB54 divided political parties into two classes. A party that is willing to select its general-election candidates only through a state-run primary is deemed a "Registered Political Party." Utah Code 20A-9-403(3)(a).). On the other hand, a party that wishes to continue using the caucus-convention process at all can be a "Qualified Political Party." Under the "Either or Both" provision quoted above, such a party can have its candidates listed on the general-election ballot, with their party affiliation, but *only* if the party also allows a candidate the alternative of forcing a primary election by gathering a certain number of signatures. See Utah Code 20A-9-101.

3. The implications of SB54 for the Utah Republican Party were clear from the beginning: If it wanted

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[2] Senate Day 24, Utah Legislative Session 2014 53:00–60:00, http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=16742&meta_id=494855; *see also* Pet. 66a n. 12 (Tymkovich, J., dissenting).

to remain a viable political party, it could choose the "registered party" route and jettison its preferred caucus-convention system entirely. Or it could choose the "qualified party" route, thus allowing candidates to *bypass* the caucus-convention system through a petition process, and thus forcing a primary election against the candidate who won in the convention pursuant to the Party's bylaws.

In other words, if the Party wanted to preserve any role for its caucus-convention system, it would have to allow candidates to declare themselves Republicans (even by switching parties) and buy their way onto the primary ballot through a petition drive, without showing any loyalty to the Party's platform or message. And if they succeeded in the primary, they would be listed under the Party's name on the general election ballot despite never being approved under the Party's own processes. SB54 would thus force the Party to accept candidates whose only real affiliation with the Party was checking a box on a state voter registration form—and in so doing would make the caucus-convention system nearly meaningless.

Finally, if the Party failed to comply fully with one option or the other, any general election candidates the Party put forward would be treated as unaffiliated—that is, *not* Republican. Utah Code 20A-6-301(g).

The legislature passed SB54 despite warnings from some legislators that "the right [to choose nominees] belongs with the party, not with the state legislature."[3]

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[3] House Day 37. Utah Legislative Session 2014, 1:36:00, 1:38:57 http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=16993&meta_id=499192 (Rep. Ivers).

C. Procedural History

In the district court, the Party sued, asserting a First Amendment challenge to (among others) the provisions of SB54 requiring the Party to violate its bylaws and accept candidates who pursue the signature path to the ballot. Pet. 101a. Respondent Utah Democratic Party intervened in support of the statute.

1. The district court converted a motion for judgment on the pleadings by Respondent Cox into a motion for summary judgment, which the court then granted. In so doing, the district court never acknowledged the evidence that the legislature enacted SB54 in part because Count My Vote wanted to change the nature of the candidates nominated by the Party, and thus the Party's message to voters. Having failed to recognize the evidence on SB54's purpose or effect, the district court concluded as a matter of law that SB54 does not severely burden the Party. Pet. 167a–181a. It reached that conclusion despite the Party's showing that SB54 burdens it in several ways, including effectively overruling

- internal Party rules governing candidate selection,
- the Party's right to control the use of the Party's name, and
- its right to enforce compliance with the Party platform and internal rules, and
- its right *not* to publicly associate with candidates who have not demonstrated their loyalty to the Party, its platform and internal processes. *Ibid.*

2. On appeal, a divided Tenth Circuit panel affirmed, concluding that the First Amendment burdens SB54 places on the Party are minimal. Ignoring that delegates elected at neighborhood caucuses rarely have leadership roles in the Party, the majority framed the issue as a choice between the views of the Party's "leadership" and those of the rank and file. Pet.20a, 22a. The majority recognized that the views of Party lay members may contradict the Party's views, as expressed through processes mandated by its bylaws. See Pet. 21a. But the majority nevertheless concluded, as a matter of law, that "SB54 was not designed to change the substantive candidates who emerged from the parties," and thus "does not impose a severe burden on the [Party] by potentially allowing the nomination of a candidate with whom the [Party] leadership disagrees." Pet. 21a, 26a.

The majority reached its conclusion about the supposedly minimal burdens imposed by SB54 by relying, not on the most recent decision of this Court in which a state attempted to change the political views of a party's candidates—*Jones*—but instead on dicta in *Lopez Torres* and other cases suggesting that states are "permitted [] to set their faces against 'party bosses' by requiring party-candidate selection through processes more favorable to insurgents, such as primaries." Pet. 18a (quoting *Lopez Torres*, 552 U.S. at 205. While acknowledging this language is dicta, the majority felt it was "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings." Pet. 18a (quoting *Gaylor* v. *United States*, 74 F.3d 214, 217 (10th Cir. 1996)). Based on these dicta—but without any evidence that "party bosses" (as opposed to thousands of elected neighborhood delegates) were controlling Party candidate selection in Utah—the majority

concluded that the relevant portion of SB54 was "only minimally burdensome on" the Party. Pet. 20a.

The majority also concluded (at Pet. 20a–23a) that the associational rights of the Party are held by the Party's 600,000 members, not the party itself, as determined by its internal bylaws or other governing documents. Again confusing elected neighborhood delegates with "party leadership," the majority concluded that "the associational rights of the party are not severely burdened when the will of those voters might reflect a different choice than would be made by the party leadership." Pet. 23a. The majority thus vested First Amendment associational rights in the Party's individual members, rather than in the Party itself, as constituted by its own internal, foundational rules, or in the thousands of neighborhood delegates authorized by the Party's bylaws to make decisions for the Party.

3. Chief Judge Tymkovich dissented. Relying upon record evidence and other material subject to judicial notice, he detailed how SB54 was a purposeful effort to change the "substantive type of candidates the Party nominates, all the while masquerading as mere procedural reform." Pet. 51a. He also explained that SB54 imposes multiple severe burdens on the Party, "transform[ing]" it "from a tight-knit community that chooses candidates deliberatively to a loosely affiliated collection of individuals who cast votes on a Tuesday in June." Pet. 65a. And he systematically explained why none of the governmental interests asserted on behalf of SB54 holds water, much less justifies SB54's severe intrusion into party autonomy. Pet. 78a–84a.

He also disagreed with the majority's conclusion that the Party's associational rights rest only with its

rank-and-file members. He noted that "[a] political party is more than the sum of its members" and that "[p]arties have associational rights that are distinct from those of the individuals that form its membership." Pet. 73a.

He thus would have held that SB54's "reforms" violate the First Amendment. Pet. 93a.

4. The Party sought rehearing *en banc*, raising the two questions presented in this petition.

Although the Tenth Circuit denied rehearing and rehearing en banc, Chief Judge Tymkovich wrote separately "to note the issues raised" by the *en banc* petition "deserve the Supreme Court's attention." Pet. 99a. One reason review is warranted, he said, is that the panel opinion followed "an oft-repeated strand of Supreme Court dicta which, as [his] dissent argues, has outlived its reliability." Pet. 99a He further explained that review is warranted because of "facts on the ground" that make "the party system [] the weakest it has ever been—a sobering reality given parties' importance to our republic's stability." Pet. 99a. Because of these factual and legal changes, he concluded that "[t]he time appears ripe for th[is] Court to reconsider (or … consider for the first time) the scope of government regulation of political party primaries and the attendant harms to associational rights and substantive ends." Pet. 99a–100a.

REASONS FOR GRANTING THE PETITION

As Chief Judge Tymkovich emphasized, the two questions presented here are important, not only because they impact every Utah party, election and voter, but also because they have sweeping implications for all political parties and, indeed, all non-profit organizations. If the decision below stands, legislatures across the Tenth Circuit and beyond will be authorized to regulate or coerce political parties, service organizations, and even religious institutions, to change the views held by their standard-bearers and thus expressed by the organization. Such quintessential viewpoint-based regulation or coercion, impacting core political speech, is both unprecedented and incompatible with the First Amendment.

I. The majority's holding on the scope a government's power over a party's candidate-selection system warrants review.

The first question merits review, not only because of its effects on the Party and Utah voters, but also because the panel decision conflicts with the reasoning of *Jones* on a question that is crucial to every political party: whether a government may effectively regulate, directly or indirectly, the internal decision-making of a private expressive association in order to alter the nature of its standard bearers and the views it and they express. As the opinion below illustrates, courts are now relying on dicta to answer that question "yes" despite *Jones*' opposite conclusion. As Chief Judge Tymkovich stressed, the sweeping implications of the Tenth Circuit's decision require consideration by this Court.

A. In flouting *Jones*, the decision below severely undercuts core First Amendment rights of all political parties.

This Court has never approved anything close to what the panel did here: authorize a government to skew a party's choice of candidates and thereby force it to accept "competing philosophies" and more "moderate" politicians. As the dissent explains (at Pet.64a), SB54 "changes the types of nominees the Party will produce and gives unwanted candidates a path to the Party's nomination." And there is no doubt that SB54's purpose and effect make it unconstitutional under the First Amendment, as interpreted in *Jones*.

1. *Jones* concerned California's Proposition 198, which created a "blanket primary" in which any Californian could vote for candidates from any party, regardless of the voter's party affiliation. The proposal was passed—in the words of its proponents—to "weaken party hard-liners and ease the way for moderate problem-solvers." 530 U.S. at 570. But the Court held that effort violated the First Amendment, noting that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Id.* at 575. The Court went on to emphasize the "special protection" the First Amendment gives to "the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences.'" *Ibid.* (citation omitted) (quoting *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 224).

Jones also examined Proposition 198's real-world impact on the election process. The record showed there were "significantly different policy preferences between party members and primary voters who

'crossed over' from another party." 530 U.S. at 578. But, despite statistical and expert testimony on this point, the Court ultimately relied on "the whole purpose of Proposition 198"—that is, the purpose expressed by those encouraging "moderate" candidates—in holding it invalid under the First Amendment. *Ibid.*

While *Jones*' itself concerned the forced inclusion in a primary of voters who were not party members, *Jones*' logic forecloses the Tenth Circuit's holding. *Jones*, like this case, involved attempts to manipulate *who* chooses the party's representatives, and hence the messages that will be advanced under the party's banner. Like Proposition 198, SB54's stated "purpose" was to encourage more "moderate" views among the Party's nominees. And, when crafting SB54, the legislature adopted Count My Vote's views and language, with a sponsoring legislator stating while introducing the bill that it was designed to promote "competing philosophies"—i.e., philosophies that differ from those of the Party's elected neighborhood delegates.[4]

By attempting to "moderate" the Party's nominees, SB54 plainly moved the Party's nominating system *away* from choosing the "standard bearer who best represents the party's ideologies and preferences." *Jones,* 530 U.S. at 575. The Party itself has carefully chosen a process—the caucus-convention system—for selecting the Party's positions and ideological standard-bearers. That system reflects a belief—to which the duly constituted Party is entitled under the First

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[4] See n.2, supra., *accord* 79a (Tymkovich, J., dissenting). Evidence of Count My Vote's and the legislature's intent is not only cited in Chief Judge Tymkovich's dissent, but is also in the record and/or properly subject to judicial notice. See, *e.g.*, JA45; URP Supplemental Appendix at 55; Fed. R. Evid. 201.

Amendment—that members who merely register to vote as Republicans, but do not invest the time to discuss the issues and candidates in neighborhood caucuses, are not as likely to reflect the Party's values and beliefs as members who attend the caucuses.

Extending control over nominations from caucus attenders to all who choose to check a box indicating their affiliation with the Party on primary election day—as SB54's Either or Both provision does—dilutes the influence of party members who have invested the time to research the candidates and issues, and discuss them in their neighborhood caucuses.[5] As Judge Tymkovich put it (Pet.64a), that clause creates a state-

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[5] Nor is there any merit to the majority's contention (Pet.30a) that a primary system is necessary to give citizens an "effective voice in the process of deciding who will govern them." Utah's caucus-convention system gives *all* party members an "effective voice" in that process. See 5, *supra*.

A caucus-convention system also has other advantages over a primary system: It reduces the importance of incumbency, name recognition, and money; encourages more serious deliberation over issues; and encourages more interaction between candidates and voters. See Priya Chatwani, Note, *Retro Politics Back in Vogue: A Look at How the Internet Can Modernize the Reemerging Caucus*, 14. S. Cal. Interdisc. L.J. 313, 316-17 (2005) (noting that the "main strength of the [caucus-convention] system" is the "process of deliberating about issues and *** persuad[ing] voters to lend their support to a given candidate ***."); Eitan Hersh, *Primary Voters Versus Caucus Goers and the Peripheral Motivations of Political Participation*, 34 Pol. Behav. 689 (2012); David P. Redlawsk et al., *Why Iowa?: How Caucuses and Sequential Elections Improve the Presidential Nominating Process* (2010) (compared to a primary system, the Iowa Caucus encourages greater candidate interaction with voters as opposed to impersonal campaign advertising).

created "majority veto over the candidates a party selects through its carefully crafted convention process."

2. Not only are the effects of the proposition in *Jones* remarkably similar to the effects of SB54, but the panel majority followed Justice Stevens' *dissent* in that case. He argued that the "protections that the First Amendment affords to the 'internal processes' of a political party do not encompass a right to exclude nonmembers from" a partisan open primary. 530 U.S. at 595–96. And his argument was nearly identical to the majority's argument here: Because a primary involves a "state-run, state-financed ballot," a party has a less compelling interesting in the internal process of selecting its candidates than a church or other association has in selecting its leaders. See Pet. 15a, 17a n.6. Some of Utah's legislators apparently embraced this same view.[6]

But in *Jones,* the majority squarely rejected Justice Stevens' argument. The Court reasoned instead that a party's chosen candidate selection process requires strong First Amendment protection because "a party's choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support." *Id.* at 575. The Court thus rejected the very kind of intrusion into party autonomy that the majority approved here.

[6] House Day 37 Utah Legislative Session 2014, http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=16993&meta_id=499192 (Rep. Powell) (arguing that legislature can control political parties in different ways than other associations because "a political party asks to have its name appear on a public ballot").

The majority here (at Pet 21a) denied that the purpose of Count My Vote was "to change the substantive candidates who emerged from the parties." But as the dissent details, the *undisputed* record shows that SB54's proponents indeed sought to affect the *type* of candidates a party chooses, based on a desire for "competing philosophies" and less "extreme" views. *See supra* 20–21. Because SB54 interferes with the Party's ability to advance its own messages, *Jones* forecloses the majority's holding. At a minimum, the evidence forecloses summary judgment against the Party.

Jones, moreover, is merely one of a long line of decisions rejecting restrictions on a party's freedom to choose how it selects its candidates. In 2008, this Court noted in *Lopez Torres* that the First Amendment generally protects a party's "right to *** choose a candidate-selection process that will *in its view* produce the nominee who best represents its political platform." 552 U.S. at 202 (emphasis added). To be sure, *Lopez Torres* recognized exceptions for regulations designed to prevent discrimination or unfairness, see 552 U.S. at 202, but neither the majority nor the State attempted to defend SB54 on either of those grounds.

For similar reasons, in 1986, the Court in *Tashjian* v. *Republican Party*, 479 U.S. 208 (1986), held that a party has a constitutional right to choose an open primary, despite a state law demanding a closed primary. But here, by allowing a legislature to override the Party's own "view" of the "candidate-selection process that will produce the nominee who best represents its political platform," *Lopez Torrez,* 552 U.S. at 202, the Tenth Circuit majority has departed from this Court's teachings.

3. If allowed to stand, the majority's logic will subvert the interests of all political parties.

First, every political party—and every other expressive association—has internal rules and procedures. As discussed above, protecting an association's ability to promulgate and enforce such rules is essential to the right of expressive association that the First Amendment protects.

Second, this Nation's increasing polarization and partisanship often drive legislators, once elected, to use any technique they can to defend their electoral majorities. Granting legislators the ability to use "procedural" reforms to modify a party's choice of candidates—as the decision below does—empowers legislators to reshape the party's choice of candidate to favor their own re-election. Worse yet, such a power allows legislators from *opposing* parties to craft policies that promote candidates who will be easily defeated in general elections.

Third, "outsider" candidates are becoming a dominant force in American politics. Given that these candidates frequently defy accepted political norms, to remain viable, political parties must be allowed the tools necessary to ensure such candidates' loyalty to the party that nominates them.

Here, the Party's traditional caucus-convention system gives Utahns a measure of protection against candidates who do not actually represent their party and its values. By having neighborhood-selected delegates carefully vet all candidates, including "outsiders," the caucus-convention system increases the odds that the party's principles will remain intact.

Indeed, those states that used the caucus system for the 2016 presidential election—including Utah—tended to nominate different candidates than the states that held closed or open primaries.[7] This held true for both major political parties. Cf. David P. Redlawsk et al. *Why Iowa?: How Caucuses and Sequential Elections Improve the Presidential Nominating Process* (2010) (cited at Pet 53a (Tymkovich, J., dissenting)).

But the Tenth Circuit's decision would cripple any effort by state parties to reform their presidential nominating processes for 2020, or to adopt caucuses or other measures as a way of holding insurgent, "outsider" candidates more accountable.

4. These risks to political parties are well illustrated in this case. For example, current U.S. Congressman John Curtis initially was rejected by the neighborhood delegates. And he had several significant differences with the convention-chosen candidate, Chris Herrod, including Curtis' refusal to align with the current national party leader and his previous stint as a Democratic Party chair.[8] Curtis's subsequent electoral victory illustrates that SB54 was effective in modifying the message of the Party, just as Proposition 198 was effective in modifying the party's message in *Jones*. Curtis was able, in Judge Tym-

[7] See Politico, Key Presidential Party Candidates by State, https://www.politico.com/mapdata-2016/2016-election/primary/results/map/president.

[8] Matthew Piper, *The Agony of John Curtis*, Deseret News, Jan. 4, 2018; Courtney Tanner, *GOP candidates to replace Chaffetz snipe at front-runner John Curtis*, Salt Lake Tribune, July 30, 2017.

kovich's words (at 64a), to "ignore [the] [P]arty's chosen convention procedures without ever having to convince other members to vote to change those procedures." If the decision below stands, other legislatures' attempts to modify parties' political positions and candidates will likely be similarly effective.

In short, as Judge Tymkovich explained, without any compelling governmental interest SB54 "interferes with the Party's internal procedures, changes the kinds of nominees the Party produces ***, allows unwanted candidates to obtain the Party nomination, causes divisiveness within the Party, and reduces the loyalty of candidates to the Party's policies." Pet.69a. If those are not severe burdens on a political party within the meaning of *Jones* and other decisions of this Court, it is hard to imagine what is. [9]

5. The Ninth Circuit has also reached essentially the same result as the Tenth Circuit in *Alaska Independence Party* v. *Alaska*, 545 F.3d 1173 (9th Cir. 2008)—a case in which review in this Court was not sought.

There, the state disallowed parties from placing candidates on the primary ballot as they had previously done. *Id.* at 1175–1176. Instead, any *member* of the party could place themselves on the primary ballot

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[9] As explained by the dissent, the panel's assertion (at Pet. 27a–30a) that the Utah legislature had a sufficient interest in SB54 relies almost entirely on a mischaracterization or misunderstanding of the Party's caucus-convention process and on a government's supposed right to enact any procedural reform that in its view allows it to better "manage" primary elections. For reasons explained by Judge Tymkovich, the majority's analysis of the governmental interests violates multiple decisions of this Court, and is an additional reason for this Court's review.

so long as they met several state requirements. *Ibid.* The parties objected to the law because it forced them to associate with candidates that "are not ideologically compatible with the party." *Id.* at 1175. But the Ninth Circuit ruled the state law was facially constitutional because it imposed only a minimal burden on the parties. *Id.* at 1179. Like this case, *Alaska Independence Party* also impermissibly restricts the right of parties to choose candidates based on the party's own chosen criteria.

For all these reasons, Question 1 richly merits this Court's plenary review.

B. As the dissent explains, the dicta of this Court on which the majority relied are outdated and doing serious harm to already weakened political parties.

Instead of squarely confronting the reasoning of *Jones*, the majority below relied on what it admitted was dicta from a handful of other decisions. However, as the dissent explains, *Jones* demonstrates that these dicta are "little more than a nod to received wisdom," Pet.100a, and are outdated.

1. The dicta on which the majority relied stem ultimately from *American Party of Texas* v. *White*, 415 U.S. 767 (1974). *White* concerned challenges by minor parties to a Texas law that limited their means of choosing nominees to a convention. In rejecting an argument that the convention system was overly burdensome, the Court noted that a "[s]tate may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention." *Id.* at 781.

Absent from *White*, however, was any allegation or suggestion that the state was seeking to change the *views* of the minor parties or their candidates. The changes were challenged because the procedures themselves burdened the parties. And *White's* holding was purely procedural: "the convention process is [not] invidiously more burdensome than the primary election." *Id.* at 781.

None of this Court's decisions citing *White*'s dicta, moreover, stands for the proposition that a government may seek to influence the views and positions of candidates who will represent the party. To be sure, *Jones*, 530 U.S. at 572, and *Lopez Torres*, 552 U.S. at 205, repeated the dicta, but neither held or hinted that governments can attempt to "forc[e] political parties to associate with those who do not share their beliefs." *Jones*, 530 U.S. at 586. Both decisions stand for the opposite proposition. See *id.*; *Lopez Torres*, 552 U.S. at 202.

However, as in *Jones*—and unlike *White*—the record here demonstrates that SB54 was *designed* to influence the types of candidates ultimately selected by the Party and, therefore, "what the party represents." *Jones*, 530 U.S. at 575. Moreover, unlike *White*, the Party's caucus-convention system in this case is itself based upon a political view and message: that proactive neighborhood political participation through elected community representatives is vital to the Party's own determination of whom to endorse; that incumbents and other potential office holders should be vetted by such delegates before earning the Party's endorsement; and that Party-endorsed candidates should thereafter be held accountable to such delegates and their neighborhoods. SB54 was designed to

disadvantage that specific political view and message within a private political party, and thereby to alter the Party's views and messages.

2. If allowed to stand, the majority's extension of *White*'s dicta will undermine the autonomy of virtually every national and state political party. Armed with the Tenth Circuit's decision and the Ninth Circuit's *Alaska* decision, legislatures across the nation can now treat the *White* dicta as binding precedent that cabins—or effectively overrules—*Jones*' prohibition on government efforts to change a party's message. Instead, the Ninth and Tenth Circuits' decisions would allow incumbent legislators to target with "procedural" reforms political parties that incumbents—or other powerful groups—deem insufficiently pliable. This would elevate the voices and views of party members who favor such groups at the expense of other party members, thereby changing the party's message.

Given that the court below mistakenly used the dicta from *White* and other cases to undercut *Jones'* application to this case, these dicta should be narrowed or repudiated. As both Judge Tymkovich and academic commentators have noted, this Court has recently narrowed the dicta's logic[10]—but obviously

[10] Pet. 86a (quoting Richard L. Hasen, *"Too Plain for Argument?" The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees Through Direct and Equal Primaries*, 102 Nw. U. L. Rev. 2009, 2010 (2008) ("cases recognizing the parties' rights to overrule the states on the open or closed nature of political primaries" makes the status of this dicta "uncertain") and Nathaniel Persily, *Toward a Functional Defense of Political Autonomy*, 76 N.Y.U. L. Rev. 750, 785 (2001) (*Jones* follows a long line of cases upholding party autonomy and "the reasoning in *Jones* would extend to all types of primary systems")).

not enough to keep the majority below from going astray.

3. The dicta are also unworkable—indeed, dangerous. As the dissent notes, "the party system is the weakest it has ever been—a sobering reality given parties' importance to our republic's stability." Pet.100a. And the Tenth Circuit's application of *White*'s dicta further erodes the power of the parties, shifting their influence to already-entrenched legislators.

Because the Tenth Circuit viewed itself bound by the *White* dicta, this Court's intervention is needed. While those dicta are not binding precedent of this Court, the fact that the court below erroneously *believed* them to be binding means that their scope is at best unclear in light of *Jones*. Only this Court can resolve the confusion.

C. The decision below will adversely affect millions of voters.

The panel opinion will also have sweeping consequences for Utah voters. First, the 600,000-plus registered Republicans in Utah[11] will lose the right to determine the collective views and endorsements they will express through the representative caucus system chosen by the Party.

Second, all 1.6 million of Utah's voters will be at risk of being misled by the false implication that any "Republican" candidate is endorsed by the Party, pursuant to its beliefs and standards. As Judge Tymkovich explained, voters will no longer be able to judge

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[11] See Voters by Party and Status, https://elections.utah.gov/party-and-status.

candidates based on party affiliation, as a nominee selected outside the Party's chosen system may well hold views in tension with the stated party platform. See Pet. at 69a (Tymkovich, J., dissenting); see also *Rosen* v. *Brown*, 970 F.2d 169 (6th Cir. 1992) (discussing importance of party names). What those voters will likely see instead will be a series of Manchurian Candidates bearing the name of the Party, but reflecting the philosophies of whichever faction paid for their petition drives and subsequent campaigns.

Whether some voters might favor direct voting, or instead favor the views endorsed through a caucus system, is beside the point. Each general election voter can decide what weight to give to the party's endorsement, and vote accordingly. If the voters are inclined toward candidates with different views than those endorsed by the parties, they can vote for such candidates—and parties can choose to adjust accordingly. But under the First Amendment, it is the Party that has a right to determine its own views in its own manner, and to endorse the candidate it believes best reflects those views.

Third, Party members and, indeed, all Utah voters, will lose the neighborhood vetting process that the caucus system gives them. See *supra* 4–8. Because SB54 allows candidates to bypass the neighborhood caucus system, it is likely to receive less and less attention over time, as both candidates and caucus-goers realize it has little effect on the ultimate nominations.

Finally, the panel decision will authorize state legislatures throughout the Tenth Circuit—and indeed, all legislatures nationwide—to do exactly what *Jones* forbids: manipulate a political party's choice of candidate to be more moderate, or more extreme, depending

on the legislature's point of view. This was SB54's self-evident purpose, and the short time since it has been implemented demonstrates that it is having that very effect. See *supra* 20–21.

By giving *legislatures* increased control over political parties, the panel's decision will give even more power to incumbents. That in turn will work to the detriment of all voters, especially those who would prefer to see more genuine political options.

* * * * *

This Court routinely grants review of decisions threatening the autonomy of political parties without waiting for the lower courts to split on the underlying legal questions. That was true not only in *Jones*,[12] but also in *Washington State Grange* v. *Washington State Republican Party*,[13] *Clingman* v. *Beaver*,[14] and other, older cases.[15] Thus, even setting aside the Tenth Circuit's departure from *Jones* and its misapplication of the *White* dicta, the question presented here is "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10.

For all these reasons, certiorari should be granted on the first question.

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[12] Petition for Writ of Certiorari, *California Democratic Party* v. *Jones*, No. 99-401 (not alleging split), *cert granted*, 528 U.S. 1133 (2000).

[13] Petitions for Writs of Certiorari, *Washington State Grange* v. *Washington State Republican Party*, Nos. 06-713, 06-730 (not alleging split), *cert granted*, 549 U.S. 1251.

[14] Petition for Writ of Certiorari, *Clingman* v. *Beaver*, No. 05-307 (not alleging split), *cert granted*, 542 U.S. 965.

[15] See, *e.g.*, Petition for Writ of Certiorari, *Terry* v. *Adams*, No. 52 (1952) (not alleging square split), *cert granted*. 344 U.S. 883.

II. The majority's holding on the proper methodology for determining First Amendment burdens warrants review.

The opinion below (at Pet 23a) also holds that, because the Party wishes to have hundreds of thousands of Utahns as members, the Party's *own* views—as determined through procedures established by the Party's governing documents—are irrelevant to whether the Party has suffered a First Amendment burden. As Judge Tymkovich concluded, this holding likewise merits this Court's review. Pet. 100a ("I write separately to note the *issues* raised here deserve the Supreme Court's attention.") (concurring in denial of rehearing *en banc*).

A. The majority violated decisions of this Court in rejecting the independent associational rights of political parties and, by extension, other expressive associations.

The Tenth Circuit majority claimed that, because the Party's *members* could vote in the primary, "the associational rights of the *party* are not severely burdened" by SB54. Pet. 23a (emphasis added). Putting aside the error in sweeping up in its classification of "party leadership" thousands of ordinary Party delegates elected by tens of thousands of Utahns at neighborhood caucus meetings, the majority's conclusion violates several decisions of this Court.

1. As Judge Tymkovich explained (Pet. 73a), the majority's holding on this question is foreclosed by the holding in *Eu* v. *S.F. City Democratic Central Committee* that "[f]reedom of association … encompasses a political party's decisions about the identity of, *and the process for electing*, its leaders." 489 U.S. 214, 228, 230

(1989) (emphasis added). The same reasoning, obviously, extends to the party's choice of candidates. And this Court's emphasis on the party's "process for electing" its leaders and representatives establishes that the party itself has First Amendment rights, apart from those of its members. It follows that the First Amendment "burden" imposed by a law regulating that process, directly or indirectly, must be determined with reference to the party itself, independent of any impact the law might have on members. See Pet. 73a (Tymkovich, dissenting).

Jones likewise protects the right of a political party, as an *institution*, in not having its message or its endorsement of a standard-bearer changed. 530 U.S. at 571, 582. Indeed, *Jones* squarely held that government action that changes a party's message by forced association is a heavy "burden on [the] political *party's* associational freedom." *Id.* (emphasis added). Unlike the majority below, this Court didn't limit its "burden" analysis to party members, much less treat party members as equivalent to the party itself.

The recent four-Justice concurrence in *Gill* v. *Whitford* also shows that the rights of political parties are separate from the rights of party members. Quoting Justice Kennedy, Justice Kagan explained that "significant First Amendment concerns arise" when a State purposely "subject[s] a group of voters *or their party* to disfavored treatment." *Id.* (quoting *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment) (emphasis added; internal quotation marks omitted)). The concurrence went on to clarify that state-created burdens that are "true [burdens] for party members may be doubly [so] for party officials and triply [so] for the party itself * * *." *Id.*

Just like *Eu* and *Jones*, the *Gill* concurrence forecloses the Tenth Circuit's rule: The mere fact that Party *members* supposedly were not burdened because they could still vote for Republican candidates does not imply that the Party itself was not severely burdened by SB54. The Tenth Circuit's opinion thus conflicts in principle with multiple decisions of this Court on this crucial question, and hence warrants review.

2. The Tenth Circuit's "burden analysis" is also contrary to *Boy Scouts of America* v, *Dale,* which involved the Boy Scouts' policy of opposing same-sex intimacy on the part of local leaders. 530 U.S. 650 (2000). There this Court rejected the lower court's assertion that, to suffer severe First Amendment harm, the Scouting organization must proselytize its view to its members. *Id.* at 690–692, 698 (2000). Instead, recognizing that some members disagreed with the policy, the Court noted that "the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'" *Id.* at 655. Instead the Court declared: "The Boy Scouts takes an official position *** and that is sufficient for First Amendment purposes." *Id.*

In *Dale,* moreover, that "official position" was determined, not by the latest popular vote of the association's rank and file, but by the organization itself, acting pursuant to its governing documents. *Id.* at 651–653. And denying the organization its ability to implement that position, the Court held, was a severe burden on the organization's First Amendment rights. *Id.* at 659.

Here, the Tenth Circuit majority ignored *Dale* in favor of the very populist view that decision rejected.

Instead, the panel concluded (Pet.22a) that requiring the Party to violate its own views on representative government is no burden on the Party, because the replacement system is a popular vote. But that is a flat violation of the principle applied in *Dale* as well as the other decisions cited above.

3. The institutional freedom recognized in these decisions has strong roots in the history of the First Amendment. For example, in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, this Court noted that a fundamental reason for the First Amendment's adoption was to protect "the freedom of religious groups to select their own" leaders and, by implication, the process for selecting them. 565 U.S. 171, 184 (2012). Moreover, as Justice Alito, joined by Justice Kagan, observed in *Hosanna-Tabor*, this freedom, while especially strong for religious groups, extends to *all* expressive associations. See *id.* at 200.

4. The panel opinion turns both history and precedent on their heads. Rather than deferring to the Party's method for selecting candidates, or even recognizing the Party's own First Amendment burdens, the panel authorizes the *government* to dictate how the Party's candidates will be selected. Accordingly, as Judge Tymkovich explained (at Pet. 65a), "the new procedures [mandated by SB54] transform the Party from a tight-knit community that chooses candidates deliberatively to a loosely affiliated collection of individuals." Thus, the Party loses "control over the *selection* of those who will personify its beliefs." *Hosanna-Tabor* 565 U.S. at 188 (emphasis added) (church autonomy case). It is hard to imagine a more severe burden on an organization's First Amendment rights—

whether or not rank-and-file members are also burdened.

Here, moreover, the organization's beliefs include the political view—codified in the Party's documents—that neighborhood political participation is preferable to retail electioneering as a method for selecting which candidates will earn the Party's endorsement. Even if some Party members may prefer direct elections, that preference cannot defeat the Party's own constitutional interests. And by forcing the Party's own chosen candidate to compete against candidates who disagree with the Party's caucus-convention system, the majority is pitting the Party against itself.

The majority responded (at Pet. 21a n.8) that, under *Jones*, the Party has a First Amendment right only to *endorse* candidates. But that is precisely what selection of a party's *candidate* does – it identifies which candidate is endorsed by the party. Unlike a non-partisan primary that does not purport to identify a "party's" chosen candidate, Utah has a partisan primary, and the emerging candidates are indeed those claiming to represent the party qua party.

In short, there can be no doubt that, as Judge Tymkovich emphasized, the majority departed from this Court's precedents in conflating the interests of the Party with those of its members. For that reason alone, the majority's decision merits this Court's review.

B. The question merits review because of its devastating practical implications for parties and other expressive associations.

The panel's opinion also warrants review because of its sweeping practical consequences: It effectively authorizes governments to change the election processes of not only political parties, but most expressive associations.

1. As explained above, the decision below holds that a political party is not burdened by state pressure to make certain choices so long as the lay membership is deemed likely to favor the ultimate outcome. This implies that governmental interference in internal Party choices—whether to hold caucuses, how to hold elections, or even what platform to maintain—do not burden the Party as an institution so long as lay members have the ultimate decision via some form of popular decision making.

But a political party is typically governed by representatives just like our nation is. And it is startling to suggest that the First Amendment does not protect a party's chosen structure of decision-making simply because it is "republican" in form rather than directly populist. Cf., *e.g.,* U.S. Const. Art. II, § 1 (electoral college). The Tenth Circuit's ruling thus jeopardizes any indirect decision-making process or delegate system, including the super-delegate process that the national Democratic Party has long used to nominate Presidential candidates.

Armed with the decision below, moreover, legislatures in the Tenth Circuit and elsewhere could try to punish political parties by forcing internal (or external) choices to be voted on by the party's membership.

Not only would this burden any party so affected, it would also burden the party's members, many of whom have likely joined the party in part because of its pre-existing decision-making apparatus.

2. The same analytical errors that endanger political parties endanger all expressive associations. For example, nothing in the panel opinion suggests any reason why the Tenth Circuit's "burden" analysis would not equally apply to the Boy Scouts, the Sierra Club, or any other private association with members or stakeholders. Under the Tenth Circuit's legal theory, a state could authorize the lay membership to elect the Sierra Club's President directly, without "burdening" the Club itself. Or it could authorize parents to hire a private school's teachers without "burdening" the school's views, as expressed through its governing documents.

To be sure, in a footnote added at the rehearing stage, the majority disclaimed any intention to "address the reach of governmental power to regulate other associational nominating decisions." Pet. 51a n.29. But this is cold comfort: The same First Amendment principles protecting the associational autonomy of political parties also apply to other expressive organizations. And although it might be possible to cabin the majority's analysis of governmental *interests* to political parties, the majority's First Amendment "burden" analysis would logically apply to all expressive organizations.

Moreover, manipulation of a political party's campaign-related associations and expression is among the heaviest of First Amendment burdens. As the Court put it in *Eu,* "[T]he First Amendment has its fullest and most urgent application to speech uttered

during a campaign for political office." *Eu*, 489 U.S. at 223 (internal quotation marks omitted). Given that the panel endorsed the viewpoint-based manipulation of core campaign-related speech and association, in part by conflating the interests of the Party with those of its members, other associational entities would be unlikely to prevail on the "burden" issue if the majority's approach stands.

3. As Judge Tymkovich pointed out (at Pet.65a), these consequences would logically extend even to churches and other religious organizations, as the same freedom of association applies to them as other institutions. To be sure, the Free Exercise and Establishment Clauses provide additional protections for religious organizations. But a court could easily sidestep these protections under current precedent:

- Because the Free Exercise Clause likewise requires an entity to be "substantially burdened,"[16] a court relying on the Tenth Circuit's decision could view that burden in terms of its effect on adherents, rather than on the organization itself. It could therefore uphold a law shifting any number of decisions from a religious organization to a popular vote of that organization's members, without finding any "burden" on the organization itself.
- Likewise, if a law were neutral and generally applicable—that is, applied to all non-profit entities—a court under a common interpretation

[16] *E.g. Employment Div.* v. *Smith*, 494 U.S. 872, 883 (1990) (summarizing case law); see also 42 U.S.C. 2000bb-1 (statutory protection providing the same requirement).

> of present precedent could rule that the Free Exercise Clause doesn't protect churches from such a law any more than other associations.[17]

While this Court may someday clarify the scope of the Religion Clauses to foreclose such arguments, the Court has not yet done so.[18] Thus, with the precedent cited above, the Tenth Circuit's decision arguably enables legislatures to force alterations to the decision-making processes of churches and other religious organizations.

In short, on the second question presented, the panel's decision not only conflicts in principle with numerous decisions of this Court, it opens the door to governments imposing severe burdens on political parties and all expressive organizations. Review is warranted on this question as well.

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[17] *Smith*, 494 U.S. at 887–890.

[18] See, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting) (noting need for additional briefing and argument on neutral and generally applicable rule).

CONCLUSION

The majority's decision is a major threat to an important First Amendment freedom that this Court has long recognized in a variety of contexts, namely, the right of a political party—or any other expressive association—to choose for itself "the process by which [it] selects a standard bearer." *Jones,* 530 U.S. at 575. But the majority's decision also gives this Court a good opportunity to resolve manifest confusion—in the Tenth Circuit and elsewhere—about the proper scope of that vital freedom.

The petition should be granted.

Respectfully submitted,

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