No. 18-450

IN THE

Supreme Court of the United States

UTAH REPUBLICAN PARTY,

Petitioner,

v.

SPENCER J. COX, LIEUTENANT GOVERNOR OF UTAH, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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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). But below the Tenth Circuit joined the Ninth in permitting government to compel 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 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?

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INTEREST OF *AMICUS CURIAE*[1]

Phyllis Schlafly, who founded *amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") in 1981, was a leading proponent of the importance of political parties. She attended every Republican National Convention from 1952 through

[1] *Amicus* Eagle Forum Education & Legal Defense Fund files this brief after providing the requisite ten days' prior written notice to all parties. Petitioner has filed a blanket consent for amicus briefs with this Court, and all Respondents (including Intervenor Utah Democratic Party) have provided written consent to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

2016, a span of 64 years, and was a delegate or alternative delegate at every one of those conventions except two. Her best-selling book, *A Choice Not An Echo* (1964), concerned a behind-the-scenes look at Republican National Conventions and stressed the importance of nominating a candidate who is a real "choice", and not merely an "echo" of the other side.

Amicus Eagle Forum ELDF, in a brief co-signed by Phyllis Schlafly, participated as *amicus curiae* on the prevailing side in the 7-2 decision by this Court to overturn California Proposition 198 for its unconstitutional interference with how political parties select their nominees. *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000). This brief is an extrapolation of that effort; here the issue is the intermeddling by the Utah legislature in the nomination processes of political parties.

Phyllis Schlafly, who passed away in 2016, and *amicus* Eagle Forum ELDF have been strong defenders of our two-party system, which depends on independent and autonomous political parties competing vigorously against either other and often against entrenched incumbents. *Amicus* Eagle Forum ELDF is a nonprofit Illinois corporation that has long defended the rights of political parties to engage fully in freedom of association and speech in order to advance the principles for which they stand. Eagle Forum ELDF has filed numerous amicus briefs in this Court on First Amendment and other issues.

Amicus Eagle Forum ELDF has a direct and vital interest in opposing infringement by government on the processes used by political parties to nominate their candidates, which is the issue squarely presented by the Petition here.

SUMMARY OF ARGUMENT

In their own day, abolitionists and even the signers of the Declaration of Independence were considered to be "extremists". Conversely, moderates on certain issues 100 or 200 years ago would be considered extremists today. The Utah legislation at issue, SB54, cannot be justified based on its underlying goal of reducing extremism in political nominees. Some considered to be extremist today may be viewed as a moderate in the future, and vice-versa.

Without citing a genuine compelling interest, the decision below infringes on the First Amendment right of political parties to seek adherence to their party platforms by their nominees, through the use of caucuses and conventions. If, as the Tenth Circuit held below, it were constitutional for government to interfere in this process, then Congress could intermeddle in the national political conventions that select the presidential nominees. Nothing could be more antithetical to the First Amendment, and this Court should grant the Petition to stamp out this pernicious infringement on political freedom before it spreads further.

Justice Scalia observed nearly two decades ago how important it is for political parties to have nearly unfettered control over their own nominating process. Justice Scalia wrote for the Court as follows:

> In the 1860 presidential election, if opponents of the fledgling Republican Party had been able to cause its nomination of a pro-slavery candidate in place of Abraham Lincoln, the coalition of intraparty factions forming behind him likely would have disintegrated, endangering the party's

> survival and thwarting its effort to fill the vacuum left by the dissolution of the Whigs.

Cal. Democratic Party, 530 U.S. at 579. The Republican Party had a necessarily broad constitutional right to pick its nominee in 1860 without interference by government, and it must continue to have the same right today.

Yet the Tenth Circuit contravened the First Amendment and the precedents of this Court by allowing Utah to dictate how political parties must nominate their candidates for office. Legislators, particularly entrenched ones, may not like the existence of political party platforms, and probably do not want any accountability for departing from them. But impeding nominating conventions is not an approach that comports with the Constitution. The decision below runs afoul of this Court's precedents concerning political parties, and is contrary to the logic of its rulings against compelled speech in other contexts.

The Petition for a Writ of Certiorari should be granted because the First Amendment rights of political parties are a matter of enormous national importance, and the Tenth Circuit gravely erred in allowing government to interfere with how political parties nominate their candidates.

ARGUMENT

As Justice Scalia emphasized for the Court, "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Cal. Democratic Party*, 530 U.S. at 575. He then elaborated:

> That [nomination] process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views.

Id. The "positions [that] are predetermined" are, of course, the political party's platform, and a nominating convention is the most effective way of ensuring compliance with the platform. It is a severe infringement on the First Amendment to interfere with this fundamental political right.

I. THE DECISION BELOW INFRINGES ON THE FIRST AMENDMENT RIGHT OF POLITICAL PARTIES TO ENFORCE THEIR PLATFORMS AT NOMINATING CONVENTIONS TO PICK REAL "CHOICES" RATHER THAN "ECHOES".

The Tenth Circuit acknowledged the essential right of a political party to establish its platform, but then ignored the equally important right of being able to enforce it. "When a party selects its platform … the state generally has no more interest in these internal activities than in the administration of the local Elks lodge or bar association." *Utah Republican Party v. Cox*, 885 F.3d 1219, 1229 (10th Cir. 2018). A nominating convention is the enforcement mechanism, which must likewise be protected by the First Amendment.

The original Republican Party platform was extreme to the mainstream culture of that day, and the platform could have been a dead letter without a means to enforce it. The 1856 Republican Party platform opposed what it called the "twin relics of

barbarism": slavery and polygamy. This was, by any measure, an "extremist" document. The platform boldly declared, in language offensive to many at the time:

> "That the Constitution confers upon Congress sovereign powers over the Territories of the United States for their government; and that in the exercise of this power, it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism – Polygamy, and Slavery.[2]

Contrast that with the moderate Whig Party platform of 1856, which failed to expressly criticize either "slavery" or "polygamy".[3]

It was the "extremist" new Republican Party platform that produced Abraham Lincoln as the Republican nominee for Senate in 1858 in Illinois, by a convention rather than popular vote. On June 16, 1858, the Illinois Republican convention nominated Lincoln as its flagbearer,[4] and that salutary process resulted in his historic – but then-radical – "House Divided" acceptance speech:

> "A house divided against itself cannot stand." I believe this government cannot endure, permanently half *slave* and half *free*. I do not

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[2] https://www.presidency.ucsb.edu/documents/republican-party-platform-1856 (viewed Oct. 31, 2018).

[3] https://www.presidency.ucsb.edu/documents/whig-party-platform-1856 (viewed Oct. 31, 2018).

[4] Lincoln Chronology (National Park Service) https://www.nps.gov/liho/learn/historyculture/lincolnchronology.htm (viewed Oct. 31, 2018).

> expect the Union to be *dissolved* – I do not expect the house to *fall* – but I do expect it will cease to be divided. It will become *all* one thing, or *all* the other.[5]

Adherence to party platforms remains just as important today. Ronald Reagan rose to prominence in the Republican Party by praising its platform at the national convention in 1976, when he delivered extemporaneously his oft-quoted enthusiasm about how "[o]ur platform is a banner of bold, unmistakable colors with no pastel shades."[6] The grassroots of the Republican Party realized then that Reagan was a candidate who would adhere to the platform, and the GOP nominated him for president four and eight years later.

"[P]arty platforms are written for the purpose of enunciating the principles for which that party and its candidates stand, and ***the candidates for these offices so placed in nomination are pledged to the support of these principles*** …." *State ex rel. Weinberger v. Miller,* 87 Ohio St. 12, 47-48 (1912) (emphasis added). A nominating convention is the means to that end, and the constitutional right to adopt a platform would be diminished without the right to nominate candidates by a convention.

In addition to infringing on the rights of political parties to enforce their platforms, the Tenth Circuit decision below also flouts the ruling by this Court in

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5 https://www.nps.gov/liho/learn/historyculture/housedivided.htm (citing Mark E. Neely, Jr., *The Abraham Lincoln Encyclopedia*. (New York: Da Capo Press, Inc. 1982)).

6 Phyllis Schlafly, "A Choice Not An Echo" 164 (Regnery: 2014).

Tashjian v. Republican Party, 479 U.S. 208 (1986). There this Court invalidated a Connecticut statute that required a closed primary system for the political parties, such that the Republican Party was prohibited from opening its primaries to independent voters. This Court invalidated that interference by Connecticut with the primary process.

The dissent by Justice Scalia in that case, which was joined by Chief Justice Rehnquist and Justice O'Connor, was based on the assumption that the State may not do what Utah has done here. Justice Scalia wrote that Connecticut should be able to prohibit open primaries, whereby Independents could vote in the Republican primary, precisely because the Republican Party has an unquestionable First Amendment right not to hold a primary at all. "The ability of the members of the Republican Party to select their own candidate … ***unquestionably*** implicates an associational freedom." *Tashjian*, 479 U.S. at 235-36 (Scalia, J., dissenting, emphasis added).

Likewise, this Court in an 8-1 decision on a similar issue emphasized the full First Amendment right of association of political parties, in *Am. Party of Tex. v. White*, 415 U.S. 767 (1974). The holding by the Court included the following:

> It is too plain for argument, and it is not contested here, that the State 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 (emphasis added).

Similarly, this Court has stressed that the protection provided by the First Amendment is at its zenith with respect to political parties and political speech, and "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quoting *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)). That protection is undermined by the decision below.

Moreover, associational rights central to political parties "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. Little Rock*, 361 U.S. 516, 523 (1960). These rights can be unconstitutionally infringed upon even by legislation or governmental action that does not directly restrict the ability to associate freely. *See, e.g.*, *Healy v. James*, 408 U.S. 169, 183 (1972).

Interference by government in our political freedoms by intermeddling in how political parties nominate their candidates for office is far beyond what is permissible under the First Amendment. Such nominations are entirely the business of the political parties themselves. It is not a proper function of government to put its thumb on the scale to tilt the process towards one side or the other. It is an infringement of freedom of speech and association for government to interfere with political parties, as this Court has held. *See Eu*, 489 U.S. at 224.

During the pendency of this case the national Democratic Party changed its nominating process for

president, which it plainly has the constitutional right to do. In August 2018, the Democratic Party took away voting rights from its "superdelegates" on the first presidential nominating ballot, thereby reducing the power of party insiders who had favored Hillary Clinton in 2016.[7] It is up to the Democratic Party itself, and no one else, how it nominates candidates for public office. Likewise, the Utah Republican Party can not properly be limited in how it chooses its nominees.

Government is not the policeman of private political parties, and should not so aspire. Aside from prohibiting corruption and other wrongdoing, government should not be dictating to private citizens what they may or may not do in selecting the flagbearers for their political parties. In our constitutional republic it is improper for government to require political parties to select their nominees solely by media-driven popularity contests.

II. COMPELLED PROCESSES FOR POLITICAL PARTIES TO NOMINATE MODERATE CANDIDATES ARE AS CONSTITUTIONALLY INFIRM AS COMPELLED SPEECH.

Compelled speech doctrine protects persons from being forced to say things with which they disagree. This doctrine prohibits coercing participation in private expressive associations, and hence coercing political parties to adopt processes to choose more moderate leaders is likewise unconstitutional.

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[7] David Siders & Natasha Korecki, "Democrats strip superdelegates of power in picking presidential nominee," *Politico* (Aug. 25, 2018).
https://www.politico.com/story/2018/08/25/superdelegates-democrats-presidential-nominee-796151 (viewed Oct. 21, 2018).

The subject legislation, Utah SB 54, forces a private association to speak in one way rather than another. Utah Code 20A-9-403(1)(a). "Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views …." *United States v. United Foods*, 533 U.S. 405, 410 (2001). While ostensibly the State of Utah is not compelling the political parties to espouse a particular political view, in fact the legislation untenably forces the political parties to use a nominating process that is more likely to result in the advocacy of moderate viewpoints. *Cf. Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284 n.4 (10th Cir. 2004) ("The constitutional harm — and what the First Amendment prohibits — is being forced to speak rather than to remain silent.")

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). While Utah has not, strictly speaking, required the Utah Republican Party "to confess by word or act their faith" in something, Utah has "prescribe[d] what shall be orthodox in politics": the nomination of candidates by a public election rather than by deliberative caucuses and a convention. It is not for government to prescribe such orthodoxy.

Justice Jackson's famous observation that "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard" resonates here. *Id.* at 641. There is no "politically correct" way for a political

party to select its nominees for office, and it was unconstitutional for Utah to impose one.

In addition to its constitutional flaws, Utah SB54 weakens political parties. "In important ways, the party system is the weakest it has ever been—a sobering reality given parties' importance to our republic's stability," wrote Judge Tymkovich below. *Utah Republican Party v. Cox*, 892 F.3d 1066, 1072 (10th Cir. 2018) (Tymkovich, J., concurring in the denial of rehearing en banc). Judge Tymkovich was right in urging this Court "to reconsider (or rather, as I see it, consider for the first time) the scope of government regulation of political party primaries and the attendant harms to associational rights and substantive ends." *Id.*

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, it should be granted.

Respectfully submitted,

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