

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 OF *AMICI CURIAE*
POLITICAL PARTIES
IN SUPPORT OF PETITION AND REVERSAL**

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INTEREST OF *AMICI CURIAE*¹

Amici include national and state political parties throughout the United States. *Amici* also include a coalition of most of the nation's nationally-organized minor parties. *Amici* are concerned that the Tenth Circuit went too far in restricting the rights of the Utah Republican Party. There is significant concern that these restrictions will spread to political parties throughout the nation, which could undermine each political party's autonomy and the ability for parties to effectively govern themselves.

¹ *Amici curiae* are listed in full in Appendix A. As required by Rule 37 of the Rules of this Court, *amici curiae* notified counsel of record for all parties of their intention to file this brief at least 10 days before the due date. The parties all have consented to the filing of this brief. *Amici curiae* also represent that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

The Utah Republican Party (“URP”) has virtually always nominated its candidates for the general ballot through a caucus convention system. The URP views its caucus convention system as the process most likely to nominate candidates for the general ballot that best represent the party’s platform. In the URP’s caucus convention system, a group of delegates votes for and selects the party’s candidates for the general ballot. Each delegate is chosen by members of his or her community at neighborhood caucus meetings, where each member of the URP has an opportunity to participate. Once delegates are chosen, the delegates select party candidates for the general ballot at a state convention.

In 2014, the State of Utah passed legislation called SB54, which regulates the process Utah political parties use to select their candidates for the general ballot. SB54 basically forces parties, at some point in the selection process, to use a primary to nominate candidates for the general ballot. The URP believed this regulation, which ultimately eliminates its ability to choose its own process, infringed its constitutional rights, and the URP filed a lawsuit against the State of Utah in 2016. This case ended up in the Tenth Circuit, where the court ruled against the URP, and thereby permitted the State of Utah to force the URP to use a primary in the candidate selection process.

The Tenth Circuit made a number of significant errors when it ruled that the State of Utah could regulate the URP’s process for nominating

candidates. This ruling hurts the constitutional rights of political parties everywhere. Three consequences of the Tenth Circuit's ruling will be discussed in this brief: (1) political parties will have a decreased ability to protect associational rights because there will be no distinction between a party's burdens and the party's members' burdens; (2) political parties will no longer have a fundamental right to choose their own candidate selection process; and (3) political parties will have no right to stop the negative aspects of money in intraparty elections, thereby lessening the importance of a candidate's actual views and commitment to a party's platform. This court should hear this case to prevent the Tenth Circuit's elimination of the URP's rights from spreading to all other parties throughout the Tenth Circuit, and ultimately the nation.

ARGUMENT

I. Political Parties are Self Governed Through a Governing Body and Governing Documents, and a Party's Rights are Burdened Whenever its Ability to Self-Govern is Restricted.

A major reason why the Tenth Circuit incorrectly ruled in favor of Utah was the Tenth Circuit's failure to distinguish between the URP's burdens and the burdens of the URP's members. In fact, the Tenth Circuit considered the URP's burdens to be the same as the URP's member's burdens. The Tenth Circuit stated in its opinion: "[O]ur task today is to analyze SB54's burdens on the Utah Republican Party, or, put still differently the group of like-minded

individuals in Utah who have joined together under the banner of the Republican Party.” *Utah Republican Party v. Cox*, 885 F.3d 1219, 1232 (10th Cir. 2018). The Tenth’s Circuit’s failure to separate the URP’s burdens and the URP’s member’s burdens, led the Court to conclude that SB54 caused no severe burden on the URP because the Court believed that SB54 caused no severe burden on the URP’s members.

This court should correct the notion that there is no distinction between the burdens suffered by parties and their members. The Tenth Circuit’s ruling essentially means that if a party’s members’ rights have not been burdened, then the party’s rights have not been burdened. If the Tenth Circuit’s ruling stands, it could lead to mass confusion as to how political parties are governed and a significant decrease in the autonomy of all political parties. If followed by other courts, the Tenth Circuit’s ruling could result in major limits on the associational rights of political parties throughout the nation, as it has in this case. These are strong reasons why this court should hear this case, and perhaps the best way to correct the mistaken belief that a party’s burdens are no different than its member’s is to establish an accurate understanding of what a political party is and how it functions.

**A. A Political Party is an Association,
and it therefore has Protected
Constitutional Rights of its Own.**

An association is a group of individuals who have come together to act as a separate entity for a joint purpose or goal. The value of an association is

derived from the shared ideals, collective strengths, and social network of each individual forming the association. The collective qualities of an association's individuals increase the likelihood of a specific purpose or goal being accomplished than if each individual were acting alone.

The U.S. Constitution protects each individual's right to form or to become a part of an association. See *Buckley v. Valeo*, 424 U.S. 1, 27-28 (1976). Individuals also have a constitutional right to advance their beliefs and ideas. See *Roth v. United States*, 354 U.S. 476, 484 (1957). Someone does not leave behind or forfeit constitutional rights just because she joins together with others to pursue a common purpose. Rather, an individual's constitutional rights remain fully intact when joining with others to form an association, and in a sense, those rights transfer to and also protect the association. An association therefore has a constitutionally protected right to advance its beliefs and ideas. This court has stated: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty assured by the [Constitution].'" *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

A political party is an association, and it therefore has the same fundamental right as other associations to act as a single entity in advancing its beliefs and ideas. See *California Democratic Party v. Jones*, 530 U.S. 567, 592 (2000). A political party advances its beliefs and ideas principally by selecting candidates to run for office on the general ballot. The closer a candidate represents a party's values, the more effective the party will be in advancing its

platform. In fact, there is no better way for a political party to advance its platform than to nominate a candidate who is in line with the party's beliefs and ideas. This may be why this court has stated that the process a political party chooses to nominate its candidates deserves "special protection." *Id.* at 575.

The process a political party uses to nominate a candidate for the general ballot is one of the best ways to ensure a candidate is chosen who best supports the party's platform. See *Id.* at 575. There are a number of processes a party could use to nominate a candidate: open primary, closed primary, semi-closed primary, caucus convention, etc. Each possible process has strengths and weaknesses that a party must weigh in choosing the process that will best meet its needs in nominating a candidate. For example, it's no secret that the money used in politics can at times have more influence than a candidate's actual values. If a political party is concerned about money's negative influence in a primary, the party could choose to use a caucus convention process to limit this influence (this scenario is more fully discussed in Section III).

B. A Political Party is a Separate entity from its Members, and it Functions Through a Governing Body and Governing Documents.

Whichever process a political party uses in nominating a candidate for the general ballot, the decision is for the governing body to make in accordance with the party's governing documents. Although its members may participate in the selection of the governing body or creation of

governing documents, a political party is an entity that is governed only by its governing documents and governing body, not by its members. A party's members are legally separate from the party itself, and the party's members cannot legally make decisions for the party. It is a political party's governing body that must act in harmony with its governing documents to determine what principles to promote, the type of candidate that would best represent the party's platform, and what process it will use to ensure the selection of candidates who will best represent the party. Therefore, a restriction on a political party's governing documents or governing body's ability to make a decision for the party is a restriction or burden on the party's rights, not a burden on its members' rights.

A regulation that only restricts the rights of a political party, only burdens the rights of the party. With such regulation, a member may be burdened on some level, but the member's rights are not burdened. Conversely, if regulation of a political party's rights does not burden a party's members' rights, this does not mean that the party's rights are not burdened.

A political party is not unlike other organizations. For example, a corporation is a separate entity from its shareholders. A corporation is governed by both its governing documents and its governing body. The governing documents are its articles of incorporation and bylaws. The governing body is the corporation's board of directors, not its shareholders. It is the board of directors who act in accordance with the articles of incorporation and bylaws to make decisions for the corporation. The governing body of both the corporation and the political party act in accordance with the governing

documents to make decisions that will best advance the interests of each entity.

Let's say a state passes legislation that pertains only to corporations, and restricts a board of directors' ability to have their corporation donate money to political campaigns. This restriction is a burden on the corporation's right to donate, not a burden on shareholders' right to donate. The shareholders' right to donate as individuals is unaffected by such regulation, therefore the shareholders' right to donate is not burdened. Similarly, a regulation that pertains only to political parties and that restricts a party's governing documents and governing body from choosing the process the party uses to select candidates is a burden on the political party's rights, not a burden on the individual rights of its members. This is because the political party is its own separate entity, and its burdens are separate from its members.

**C. SB54 Restricted the URP's rights,
therefore SB54 Burdened the URP,
Regardless of Whether it Burdened
the URP's Members.**

In this case, the URP is governed by its constitution and the Utah State Central Committee ("SCC"). The SCC is the URP's governing body, and its role is to make decisions in accordance with the URP's constitution that will best advance the interests of the URP. The URP's Constitution states that the URP's process for selecting candidates for the general ballot must be through a caucus convention system. Utah.Gop/governance/
<https://drive.google.com/file/d/1CqLTpBbJowjOxpe1Z>

OWTXClniCgs_McD/view. Following the URP's constitution, the SCC has implemented the use of a caucus convention system to select candidates for the general ballot. A caucus convention system is the process the URP has decided to use to advance its system of beliefs and ideas; therefore, this decision is a protected Constitutional right. Any restriction on the URP's decision for the process it uses is a burden on the URP's rights. SB54 places a restriction on the URP's governing body's and governing documents' ability to dictate what process the URP will use, therefore SB54 places a burden on the URP, regardless of whether its members are burdened.

The Tenth Circuit's opinion gave more weight to the URP's members than the URP's governing body and governing documents when considering how the direction of the party is determined. This led the Tenth Circuit to wrongly equate the burdens of the URP members with the URP's burdens. This court should correctly establish that it is a political party's governing body and governing documents that make decisions for the party, not the party's members. Therefore, any restriction limiting the URP's governing documents' or governing body's right to make decisions for the URP is a burden on the URP's rights, regardless of whether the URP's members are burdened.

II. A State may not Regulate a Political Party's Ability to Choose its Candidate Nomination Process Unless the Regulation Passes Strict Scrutiny.

The Tenth Circuit's ruling in this case also undermines years of this Court's precedent related to

the appropriate level of scrutiny given to the regulation of constitutionally protected rights. If this Court does not hear this case, it will create a major disconnect between the rights this court has recognized compared to the rights the Tenth Circuit has recognized for political parties.

A. A Regulation that Eliminates a Political Party's Right to choose the Process it Uses to Select Candidates for the General Ballot Places a Severe Burden on the Party.

States may only impose a restriction on an individual's or entity's rights if the restriction passes the appropriate level of scrutiny. This court has identified three levels of scrutiny: strict scrutiny, intermediate scrutiny, and minimum scrutiny. The level of scrutiny that should apply in any given case is determined by the type of rights restricted and the amount of burden the restriction causes. Strict scrutiny is the closest level of scrutiny, and a state must show a compelling interest to pass strict scrutiny. Strict scrutiny should be applied whenever the regulation of an Constitutional right causes a severe burden. See *Clingman v Beaver*, 544 U.S. 581, 586 (2005). Therefore, this court has recognized that if a restriction on Constitutional rights causes a severe burden and does not pass strict scrutiny, then that restriction is not permissible. See *Ibid*. See also *Norman v. Reed*, 502 U.S. 279, 289 (1992).

As established above in Section I, the freedom to associate is a protected right under the constitution. Therefore, regulations that impose severe burdens on associational rights must pass

strict scrutiny. In other words, to pass strict scrutiny, a state must show that it has a compelling interest to impose a restriction on associational rights. This Court has explained: “It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech...Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matter, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” *Alabama ex rel. Patterson*, 357 U.S. at 460-61.

The freedom to associate encompasses a number of rights. One of these rights within the freedom to associate applies to political parties and gives them the right to choose the process they use to nominate a candidate for the general ballot. *N.Y. Bd. Of Elections v. Lopez Torres*, 552 U.S. 196, 202 (2008). Whether a primary or a caucus convention system, a political party has a constitutional right to choose which process it uses. This Court has specifically stated that 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.” *Id.*

A political party’s right to choose the process for selecting candidates is of such great importance that this court has repeatedly given it “special protection.” *Jones*, 530 U.S. at 575. This court has said: “[O]ur cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political

party selects a standard bearer who best represents the party's ideologies and preferences." *Ibid.* In fact, a political party's right to choose the process it uses to select a candidate may be its most important right. This Court has further explained that "in no area is the political association's right to exclude more important than in the process of selecting its nominee." *Ibid.*

Naturally, the greater importance a right has, the greater the burden will be if that right is restricted. As shown above, this court has clearly stated that a political party's right to choose its process for selecting a nominee is one of the most, if not the most, important constitutional rights it has. Because of its great importance, eliminating a political party's right to choose the process used in selecting a candidate would undoubtedly cause the party to suffer a severe burden. Therefore, an elimination of a party's right to choose its process for selecting a candidate for the general ballot must pass strict scrutiny.

B. The Tenth Circuit Never Correctly Accounted for Strict Scrutiny When using this Court's Dicta.

This court has recognized in dicta that a state may eliminate a political party's ability to choose its own process in selecting candidates by regulating whether a political party must use a primary or caucus system to nominate its candidates for the general ballot. See *Lopez Torres*, 552 U.S. at 203. Given the above analysis, this dicta can only be true if the regulation passes strict scrutiny. Unfortunately, the Tenth Circuit came to a different

conclusion. The Tenth Circuit uses this Court's dicta to conclude that the SB54 provisions which strip the URP of the right to choose what process it uses to select its candidates for the general ballot are only "minimally burdensome." The Tenth Circuit therefore concluded that it was not necessary for SB54 to pass strict scrutiny. The Tenth Circuit apparently does not follow this court's repeated recognition of the special and important right a political party has in choosing its own process for selecting candidates. The Tenth Circuit's opinion on the matter could not be more wrong and more contradictory to this court's previous statements.

It is clear that a political party has a constitutional right to choose a process for selecting candidates for the general ballot. It is also clear that this right to choose a process is an especially important right, and a restriction on a party's right to choose would be a sever burden on the party, and therefore requires strict scrutiny. SB54 restricts the URP's right to choose a process for selecting candidates. Therefore, SB54 can only be valid if it passes strict scrutiny.

This Court should grant certiorari to prevent any further misunderstanding of this Court's dicta. Strict scrutiny must apply to restrictions on a political party's right to choose its process for nominating candidates, and this court should correct the Tenth Circuit's undermining of this principle.

III. The Tenth Circuit's Decision has the Potential to Increase the Influence of Money in Nominating Candidates, thereby Making a Candidate's Values and

Commitment to the Party Platform Less Important.

Money can have a major influence on elections. Billions of dollars are spent each election cycle by candidates hoping to get elected to public office. Money is spent on media advertisements, campaign signs, and websites, all in an effort to let the public know who a candidate is or at least to influence the public to perceive a candidate in a particular way. Most are aware that money can have an influence on elections, but most might not be aware how great that influence is.

A. Many Studies Have Established a Strong Correlation between Money and Winning Elections.

There have been many studies looking into the effect money has on an election. Although there are many factors involved in getting a candidate elected, there is a strong correlation between how much money a candidate spends in election efforts and whether that candidate wins an election. For example, in a study by the Center for Responsive Politics on the 2014 election cycle, it was discovered that 94 percent of the candidates for the U.S. House who spent the most money during their campaign won. *Money is Pretty Good Predictor of Who Will Win Elections*, PBS (November 11, 2014), <https://www.pbs.org/newshour/politics/money-pretty-good-predictor-will-win-elections>. Another study by United Republic showed that the better-financed candidate wins 91 percent of the time. *91% of the Time the Better-Financed Candidate Wins*, The

Washington Post (April 4, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/04/04/think-money-doesnt-matter-in-elections-this-chart-says-youre-wrong/?noredirect=on&utm_term=.8980a37ce7c0.

There are many studies that confirm the same result over and over again: money wins elections.

What's fascinating about the above-mentioned studies is that they relate to interparty elections where political parties competed against each other. With interparty elections, each candidate likely has major differences in political ideas and values compared to the other candidates. For money to have such a high correlation with winning an interparty election is surprising when taking into account candidates' major differences. For example, one would think that the alignment of voters' ideas with the candidates would have more influence and a higher correlation with who wins an election. One can only imagine the effect money has when the candidates have much more similar political views, as in primary elections.

With intraparty elections where candidates are competing against members of their own party for a spot on the general ballot, it is more difficult to distinguish the political views of the candidates. Members of the same party usually only have less differences in their ideas than those outside the party, and money would therefore logically be more important than it is for interparty elections. When political values are similar, it is name recognition and likability that matter most. And the more money a candidate spends, the more the candidate is able to get positive name recognition and portray an impression of likability. It is not hard to imagine

seeing a higher correlation with money and winning intraparty elections than it is with interparty elections.

B. The Process a Political Party Chooses to Select Candidates Can Effectively Limit the Negative Aspects of Money.

Political parties should be worried about how money influences the selection of their candidates. Parties have a desire to elect candidates that most closely represent their ideas and beliefs. The more money a candidate has to spend, the more ability the candidate has to portray herself to the public in a particular way even if the candidate's actual values are different than is being portrayed to the general public. It is not unheard of for political candidates to have been deceptive in their campaigning. The more money a candidate has, the easier it is to portray herself as true to a particular party's platform, even if the candidate's ideas are far from the party's. Political parties therefore have an interest in limiting the negative aspects of money in an intraparty election as compared to the actual beliefs and ideas of a candidate.

One of the best ways to limit the negative aspects of money in intraparty elections is through the process chosen to select candidates. For instance, when comparing a primary to a caucus convention system, a primary is more susceptible to money's influence. A primary election is open to all the members of a party, and given the large number of people generally in a party, it is typically not possible for a candidate to visit with each member before an election. For most voters in a primary election, the

only contact with a candidate is through the candidate's advertising. And the candidate with the most money is able to advertise most and therefore have the most impact on the general public.

In this regard a caucus convention system is much different than a primary. In a caucus system, because of the relatively few delegates chosen, candidates are typically able to have a meaningful individual visit with each delegate. In fact, candidates are looked upon negatively by delegates if a candidate doesn't visit with them. A meaningful visit with a candidate is much more influential on a delegate than any campaign advertisements could be. A delegate gains much more information on a candidate's actual values through a one on one visit, than through campaign advertisements. This effectively limits the influence of money in a campaign and makes it more likely to nominate a candidate who is truly committed to a party's platform. This is exactly one of the reasons the URP has chosen to use a caucus convention system in nominating its candidates for the general ballot.

Each political party faces its own challenges in nominating a candidate who best represent its platform. Each party must have the ability to tailor its processes in nominating candidates that best meet the party's unique challenges. For those parties that face challenges with money having an undesired effect on their nomination process, a caucus convention system may be the best answer. The Tenth Circuit's ruling has the potential to make political parties powerless in making decisions that limit the influence of money or that address any other unique challenge. This Court should hear this case to

give the power back to political parties to effectively overcome each party's unique challenges.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant the petition, and reverse.

Respectfully submitted,

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APPENDIX A

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| Coalition for Free and Open Elections |
| Green Party National Committee |
| Constitutional National Committee |
| American Independent National Committee |
| Libertarian Party of California |
| Libertarian Party of Louisiana |
| Libertarian Party of Michigan |
| Libertarian Party of New Mexico |
| Libertarian Party of Oklahoma |
| Libertarian Party of Georgia |
| Constitution Party of Utah |
| Idaho Republican Party |
| Utah Native American Caucus |