No. 18-450

In the Supreme Court of the United States

UTAH REPUBLICAN PARTY, PETITIONER

v.

SPENCER J. COX, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF U.S. PASTOR COUNCIL AND CHRISTIAN LIFE CENTER AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

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?

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INTEREST OF AMICI CURIAE[1]

The U.S. Pastor Council is an interdenominational, interracial coalition of over 1,000 senior pastors who have come together to bring a united, Biblical voice to the nation. It is focused on developing strong, functioning teams of pastors in each city as a means of building a grassroots network. Its mission is to empower pastors

1. All parties were timely notified and consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amici curiae, their members, or their counsel financed the preparation or submission or this brief.

and their congregations to influence the culture and community through concerted prayer, to equip our congregations for effective citizenship, and to provide a voice on spiritual, cultural, social, and moral issues from a Biblical perspective. The U.S. Pastor Council conducts luncheons, workshops, rallies, elected-official summits, and other activities that bring pastors together, provide top-quality Biblical, historical, legal, and public-policy information, as well as standing in the gap for our nation.

Christian Life Center & Layton Christian Academy is a church and private school serving over 3,000 people in the Layton, Utah area and over 200 foreign exchange students from around the world. The amici are concerned about the effects that the Tenth Circuit's opinion will have on religious freedom and the rights of private organizations to choose their leaders and representatives.

SUMMARY OF THE ARGUMENT

The court of appeals' decision presents a grave threat to the autonomy of civic and religious organizations. If the First Amendment permits a State to dictate the process by which a private political party selects its candidates, then there is nothing to stop a State from meddling in the internal affairs of any other private organization, overriding its Constitution and bylaws in an effort to produce leadership or outcomes more conducive to the tastes of state legislators. The Court should grant certiorari and issue a ringing endorsement of the associational-freedom principles that were established in *California Democratic Party v. Jones*, 530 U.S. 567, 574–575 (2000), and it should extend the holding of *Jones* to the similar

(though admittedly distinguishable) situation in this case.

This case also illustrates the shortcomings of the court-created *Anderson–Burdick* test that currently governs constitutional challenges to electoral regulations. This indeterminate "balancing" standard instructs courts to "weigh the character and magnitude of the asserted injury to the rights to protected by the First and Fourteenth Amendments" against the interests put forward by the State. *See Burdick v. Takushi*, 504 U.S. 428, 433, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Balancing tests of this sort are non-falsifiable, and they cause judicial outcomes to turn on whether individual judges think the challenged law is normatively desirable. Certiorari is warranted to limit the reach of *Anderson–Burdick* and to establish more determinate and law-based tests for evaluating constitutional challenges to electoral legislation.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' RULING THREATENS THE AUTONOMY AND ASSOCIATIONAL FREEDOM OF CIVIC AND RELIGIOUS ORGANIZATIONS

The Tenth Circuit's opinion purports to limit its holding to political parties, but its analysis has alarming implications for the autonomy of all civic and religious organizations. The panel opinion concluded, for example, that Utah's "Either or Both" law imposes only "minimal" and not "severe" burdens on a political party's First Amendment rights. Pet. App. 13a–26a. It also concluded that Utah's "Either or Both" law regulates a political

party's "external" rather than "internal" activities. Pet. App. 14a–16a.

Each of these conclusions is indefensible—and they endanger the associational freedom of all private institutions. A law that tells a private organization how it must choose its leaders and public representatives is far from a "minimal" burden on the freedom of association. And if a court is willing to downplay the intrusion that Utah's law imposes on the autonomy of political parties—writing it off as nothing more than a "minimal" burden on First Amendment freedoms—then laws that attempt to regulate the internal decisionmaking of other private institutions can be breezily upheld in the same manner.

Religious organizations have special reasons to be concerned with this aspect of the Tenth Circuit's opinion, because faith-based institutions are facing relentless attacks from activists and government officials who want to make their First Amendment freedoms give way to government-imposed policies. The predictable response of those seeking to override the autonomy of faith-based entities is to trivialize the burdens imposed on their freedom—by declaring the impositions to be not "substantial" enough to warrant protection under the federal Religious Freedom Restoration Act, *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2798–99 (2014) (Ginsburg, J., dissenting),[2] or by characterizing the or-

2. *See also Wheaton College v. Burwell*, 134 S. Ct. 2806, 2813 (2014) (Sotomayor, J., dissenting) (stay proceedings) ("It may be that what troubles Wheaton is that it must participate in *any* process the end result of which might be the provision of contra-

(continued…)

ganization's religious beliefs as "merely rhetorical" and "insubstantial," *see Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729 (2018). *See also* Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1994). The Tenth Circuit's willingness to write off the burdens imposed by state-imposed control of political parties fits within this disturbing trend—and the Court should at least grant certiorari to recognize that these burdens are substantial, even if the Court believes that the law is justified by state interests of overriding importance.

Equally disturbing is the Tenth Circuit's denial that Utah's "Either or Both" law regulates the internal affairs of the Utah Republican Party. Pet. App. 14a–16a, 19a. How could the court of appeals possibly assert that this law—which governs the process by which a political party chooses the candidates that will appear on its primary-election ballot—is concerned only with the party's "external activity" and not its "internal mechanisms"? Pet. App. 14a, 15a. Surely the party's selection of its eligible candidates is as "internal" to the party as the selection of its chairman or its platform—decisions that the Tenth Circuit *admitted* were "internal activities" shielded from state regulation. Pet. App. 14a ("The distinction between wholly internal aspects of party administration on one hand and participation in state-run, state-financed elections on the other is at the heart of this

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ceptives to its employees. But that is far from a substantial burden on its free exercise of religion.").

case. When a party selects its platform, its Chairman, or even whom it will endorse in the upcoming election, the state generally has no more interest in these internal activities than in the administration of the local Elks lodge or bar association.").

The Tenth Circuit appears to be saying that once a private organization enters the public square—in an effort to influence the government or the culture for the better—it is engaged in "external activity" rather than "internal activity," and organizational decisions that might otherwise by immune from state control now become fair game for government regulators. The Court explained:

> When a party selects its platform, its Chairman, or even whom it will endorse in the upcoming election, the state generally has no more interest in these internal activities than in the administration of the local Elks lodge or bar association. But when the party's actions turn outwards to the actual nomination and election of an individual who will swear an oath not to protect the Party, but instead to the Constitution, and when the individual ultimately elected has the responsibility to represent all the residents in his or her district, the state acquires a manifest interest in that activity, and the party's interest in such activity must share the stage with the state's manifest interest. The dissent blurs this distinction between the party's internal and external activity.

Pet. App. 14a. This is a dangerous argument that is often invoked to undermine faith-based institutions. The idea is that the autonomy of religious organizations will be protected so long as they keep to themselves and stay out of the public sphere. But once these organizations enter the marketplace, accept any form of government benefit, or partner with the government in carrying out social-welfare programs, their activities become "external" and faith-based commitments must give way to government-imposed orthodoxy. *See, e.g.*, *Christian Legal Society v. Martinez*, 561 U.S. 661, 682 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2793–97 (2014) (Ginsburg, J. dissenting) (arguing that the Religious Freedom Restoration Act offers no protection to for-profit religious corporations); Executive Order 13672 (refusing to provide any religious-freedom protections in an order banning federal contractors from discriminating on account of sexual orientation and gender identity). The Tenth Circuit's argument that the Utah Republican Party forgoes associational-freedom rights once it decides to field candidates for public office is entirely consistent with this pattern.

II. CERTIORARI IS WARRANTED TO LIMIT THE REACH OF THE LOOSE AND INDETERMINATE *ANDERSON–BURDICK* TEST

The Court should also grant certiorari to reconsider or at least limit the scope of the so-called *Anderson–Burdick* test, which the Tenth Circuit used to uphold the constitutionality of Utah's "Either or Both" law. Pet. App. 12a–13a. The *Anderson–Burdick* test suffers from the maladies that afflict all judicial balancing tests: It is

subjective and indeterminate, and it causes judicial outcomes to hinge on whether individual judges regard the challenged law as normatively desirable. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

This case aptly illustrates the shortcomings of the *Anderson–Burdick* test. A panel of three respected judges produced two divergent opinions that seemed to be talking past each other—even though the opinions taken together consume 96 pages in the petition appendix. The majority opinion upheld the law by asserting that the "burdens" imposed by the law were justified by the state's regulatory interests; the dissenting judge thought otherwise. Both sides wrote exceedingly long opinions in an effort to show that they had "balanced" the relevant considerations correctly. When constitutional rights are subjected to balancing tests of this sort, "it is always possible to disagree with such judgments and never to refute them." *Blakely v. Washington*, 542 U.S. 296, 308 (2004).

California Democratic Party v. Jones, 530 U.S. 567 (2000), did not mention or apply the *Anderson–Burdick* test, even though the case involved an electoral regulation that fell squarely within the *Anderson–Burdick* domain. That is a welcome development, and the Court should continue to marginalize *Anderson–Burdick* and other balancing tests of its ilk. Constitutional rights must be protected by non-malleable legal standards—especially in an era of polarization when judges are likely to have radically different views on the weight that should be accorded to asserted regulatory interests.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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