No. 18-450

In the Supreme Court of the United States

UTAH REPUBLICAN PARTY, PETITIONER

v.

SPENCER J. COX, ET AL.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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

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III. INTRODUCTION

This Court has consistently held that a political party's access to the ballot is subject to certain reasonable "Times, Places and Manner of holding Elections" restrictions, U.S. Const. Art. I, Sec. 4, and that those restrictions include the State's ability to require a political party to nominate its candidates via a primary election, a nominating convention, or some combination of the two. Consistent with this Constitutionally recognized power, the Utah legislature changed the Utah Election Code's nominating procedure for political parties in 2014 through a bill known as SB54. Utah law now provides candidates of Qualified Political Parties ("QPPs")[1] three routes to the primary ballot: either (1) via convention, (2) signature gathering, or (3) both (the "Either or Both Provision"). *See* Utah Code §§ 20A-9-101(12)(c); -407; -408.

In its current form, SB54 is constitutional because it does not attempt to "govern or regulate the internal procedures" of a political party. Utah Code § 20A-9-401(2). On a certified question in this case, the Utah Supreme Court has already concluded SB54 does "not amount to internal control or regulation of the party by the State." *Utah Republican Party v. Cox*, 2016 UT 17, ¶ 6, 373 P.3d 1286.

In its petition, the Utah Republican Party ("URP") contends that SB54 is the result of discrimination or animus towards URP. There is absolutely nothing in the record to support this assertion. All the evidence is to the contrary. SB54

[1] *See* Utah Code § 20A-9-101(12) (defining QPP).

was passed by a majority of legislators who were URP members,[2] signed into law by another member (Governor Herbert), and is enforced by yet another (Lieutenant Governor Cox (the "LG")). The law's stated purpose was to open new avenues for candidates to access the ballot so that primary voters had more choices. Utah Code § 20A-9-401(1). After URP's first lawsuit challenging SB54 was partially successful, striking down a provision that forced QPPs to permit unaffiliated voters' participation in their primaries, every other Registered Political Party ("RPP")[3] in Utah has accepted the law except one—URP. The Utah Democratic Party ("UDP") intervened into URP's second lawsuit challenging the constitutionality of SB54 because URP was not complying with the law.[4]

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[2] *See* SB54S2 Roll Call House (https://le.utah.gov/DynaBill/svotes.jsp?sessionid=2014GS&voteid=635&house=H) and Senate (https://le.utah.gov/DynaBill/svotes.jsp?sessionid=2014GS&voteid=893&house=S)

[3] *See* Utah Code § 20A-8-102(4) (defining RPP). All existing political parties in Utah are RPPs. Each RPP has certified to the LG that it intends to nominate its candidates in accordance with the statutory requirements of a QPP. *See* Utah Code §§ 20A-9-101(d); -406. *See also Utah Republican Party v. Cox*, 178 F. Supp. 3d 1150, 1161 & n.43 (D. Utah 2016); *Utah Republican Party v. Herbert*, 144 F. Supp. 3d 1263, 1267-1270 (D. Utah 2015). Thus, every existing political party in Utah is both an RPP and has chosen to be a QPP.

[4] URP's bylaws still do not permit its candidates to gather signatures to access the primary ballot, which the Utah Supreme Court has clearly stated QPPs are required to do, *see Utah Republican Party v. Cox*, 2016 UT 17, ¶ 6, 373 P.3d 1286,

URP's petition engages in several sleights of hand and omissions of material information to call the constitutionality of SB54 into doubt to excuse this noncompliance. Because SB54 is well within established precedent for the past five decades and public policy for the past century, this Court should deny URP's petition for a writ of certiorari.

IV. OPINIONS BELOW

Besides the decisions URP discusses in the Petition, URP's statement of the opinions below omits the Utah Supreme Court's decision regarding state law, the district court's second opinion granting summary judgment to respondent with respect to the signature gathering provisions of SB54, and the district court's decision in the first case to deny URP's request for a preliminary injunction. These omitted decisions are discussed below.

V. JURISDICTION

UDP agrees that this Court has jurisdiction to hear URP's petition pursuant to 28 U.S.C. § 1254(1).

VI. STATEMENT

URP seeks to enshrine into the Constitution the desire of a portion of its leadership to select the

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and the LG is not enforcing this willful defiance of state law. Since SB54's inception, URP's behavior has been excused as falling just short of requiring legal enforcement and UDP's claims were dismissed without prejudice after the LG obtained summary judgment against URP and were deemed not yet ripe by both the Utah Supreme Court, *see id.*, ¶¶ 8-12, and the Tenth Circuit. *See Utah Republican Party v. Cox*, 892 F.3d 1066, 1092-93 (10th Cir. 2018). UDP did not seek a writ of certiorari regarding this determination.

nomination method of their choosing, taking that selection away from the Utah Legislature. Political parties, however, have never enjoyed this desire as a constitutional protection, and for good reason. There are "two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Even these fundamental rights, however, are subject to substantial election regulatory regimes to ensure the integrity of the democratic process itself so that elections are "fair and honest" and that "order, rather than chaos" prevail. *Storer v. Brown*, 415 U. S. 724, 730 (1974).

For over a century, state legislatures have increasingly chosen to require how political parties nominate their candidates, and the Court has repeatedly stated that it was "too plain for argument," *Am. Party of Texas v. White*, 415 U. S. 767, 781 (1974), that the states have had "the undoubted right" to place such conditions into state law, *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983), "presumably because they find it beneficial to allow the general party membership a voice in the nominating process." *Nader v. Schaffer*, 417 F. Supp. 837, 843 (D. Conn.), *summarily aff'd*, 429 U.S. 989 (1976)(citing *Bullock v. Carter*, 405 U.S. 134, 148 (1972)). Allowing general party membership of all political parties a greater voice in the nomination process elections is a neutral policy judgment, not

discrimination against URP, no matter how much a few URP leaders dislike that policy judgment.

The district court found that "[t]he Undisputed Material Facts do not show that the URP was targeted or singled out because of its 'extreme' viewpoints. Indeed, this argument makes no sense. A majority of the members of the Utah Legislature are members of the URP and it is hard to believe that they would target their own party or the viewpoints their party advances." *Utah Republican Party v. Cox*, 178 F. Supp. 3d 1150, 1187 (D. Utah 2016). *See also Utah Republican Party v. Cox*, 892 F.3d 1066, 1073 (10th Cir. 2018) (noting that "the Utah Legislature — comprised of overwhelming Republican majorities in both the State House and State Senate — passed SB54"). The record below does not provide any evidence of viewpoint discrimination or animus against URP. URP's calls for this Court to revisit the factual findings of the district court should be rejected.

While URP points to three items to suggest discrimination, each is unavailing upon examination. First, its own verified complaint from the first case, (JA 57-59) is merely a sworn statement by its former party chair, not undisputed evidence that was proven in either the first case or the second. Second, isolated statements of a few URP member legislators who voted for SB54. However, it is the text of the enacted legislation, "not the preferences expressed by certain legislators," *NLRB v. SW Gen., Inc.*, 580 U.S. ___, 137 S.Ct. 929, 942 (2017), or "even a bill's sponsor," that controls. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 385 (2012). As this Court recently noted, "floor

statements by individual legislators rank among the least illuminating forms of legislative history." *SW Gen., Inc.*, 137 S.Ct. at 943. Third, statements by an organization called Count My Vote, which has twice proposed initiatives that never appeared on the ballot in Utah,[5] fair even worse. Since the Utah Supreme Court concluded the statute complained of contained "no ambiguity," *Utah Republican Party v. Cox*, 2016 UT 17, ¶ 7, 373 P.3d 1286, there is no need engage in the modern-day equivalent of reading entrails to divine the Utah Legislature's intent. *See, e.g., TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978). URP's petition should be denied.

Next, URP cites throughout its petition claimed burdens on its associational rights. Yet it omits from its petition any meaningful discussion of the results of its first challenge to SB54. And mentions only in passing that Utah offers multiple paths to the primary ballot. Pet at 7.

In the first case, URP sought a temporary restraining order against SB54, asserting the statute was facially unconstitutional. *See Utah Republican Party v. Herbert,* 133 F. Supp. 3d 1337, 1345-46 (D. Utah 2015). The district court denied URP's request for a TRO because the RPP route to the ballot was

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[5] *See generally Cox*, 892 F.3d at 1096-97 & 1083 n.15 (describing Count My Vote's role in SB54's passage); Lee Davidson, "Utah Supreme Court deals a blow to Count My Vote: Election reform initiative won't be on November's ballot," Salt Lake Tribune, Aug. 24, 2018.

perfectly constitutional,[6] and URP could opt to remain an RPP rather than access the ballot as a QPP. *See id.*, at 1342-48. No political party in Utah has ever challenged the constitutionality of the RPP route. Instead, URP conceded that the RPP path to Utah's ballot was unquestionably constitutional. *See id.*, at 1347 & n.49. When this reality is considered, URP's petition amounts to a complaint about claimed burdens imposed upon it because URP has chosen to nominate its candidates by one path to the ballot (QPP), rather than another path (RPP) that it concedes is constitutional.

At the summary judgment stage of the first case, URP challenged SB54's requirement that persons who were not members of any political party be allowed to participate in the primary election of URP's candidate (the "Unaffiliated Voter Provision"). *See* Utah Code § 20A-9-101(12)(a) (2015). The district court struck that requirement from SB54 so that the decision who may participate in a primary election of a party's candidate is left to the party. *See Utah Republican Party v. Herbert*, 144 F. Supp. 3d 1263 (D. Utah 2015). Since the District Court struck down the Unaffiliated Vote Provision, URP can ensure that any voter in its primary election is a URP member, and SB54 imposes no limits on how a party regulates its membership. *See* Utah Code § 20A-9-401(2). In the face of these facts, the burdens URP claims on its associational rights dissolve.

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[6] Under the RPP route, an RPP candidate needs to gather signatures of at least 2% of the total votes cast for that race to access the ballot. *See* Utah Code § 20A-8-102(4). *See also supra* note 3 (explaining the differences between an RPP and a QPP).

URP retains the right to ensure its primary election is limited to those it wishes to permit to participate. URP's own choice to operate as a QPP and its decision not to regulate its membership internally,[7] not SB54, is to blame for candidates that some of the party's leadership dislikes. Yet, the Constitution does not permit the state or the courts to protect a political party from itself. *See San Francisco Cty. Democratic Cent. Com. v. Eu*, 826 F.2d 814, 831 (9th Cir. 1987), *aff'd* 485 U.S. 1004 (1988).

By focusing its argument on one particular part of the QPP path to the ballot rather that all of the paths available under SB54, URP engages in sleight of hand, and ignores precedent that demands consideration of the entire ballot process when evaluating constitutional burdens. *See Cox*, 892 F.3d at 1088 (citing cases). The RPP path was also important to the district court's decision in the second case upholding Utah Code § 20A-9-408 (the "Signature Gathering Provision") because the RPP path provides unimpeachably constitutional route to access the ballot. *See Cox*, 178 F. Supp. at 1161, 1183; 177 F. Supp. 3d 1343, 1364-71(D. Utah 2016). Perhaps this is why URP has conveniently omitted from its petition the district court opinion regarding the Signature Gathering Provision.

URP's attempt to isolate its complaints about one part of the QPP path from the rest of Utah's Election Code does not create a constitutional

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[7] *See Utah Republican Party v. Cox*, 178 F. Supp. 3d 1150, 1183-84 (D. Utah 2016); *Utah Republican Party v. Cox*, 2016 UT 17, ¶¶ 8-11, 373 P.3d 1286 (Utah 2016).

problem. As noted throughout UDP's brief, this Court has repeatedly explained that a state's election code should be evaluated in its entirety and the rights of a political party must be balanced against those of candidates, the state, and the electorate. URP's petition should be denied.

VII. REASONS FOR DENYING PETITION

A. URP's Preference for Nominating Conventions is Not Constitutionally Protected.

"[M]ost American states, when adopting direct-primary legislation in the twentieth century, followed the mandatory pattern established by Wisconsin in 1903. . . . By 1912, a majority of states had adopted mandatory primary laws, and by 1917, all but four states had direct-primary laws for at least some state offices." Leon D. Epstein, Political Parties in the American Mold 168, 169 (1986).[8] By 1952, this Court observed that "[d]issatisfaction with the manipulation of conventions caused that system to be largely superseded by the direct primary." *Ray v. Blair*, 343 U.S. 214, 221 (1952). "Unlike their counterparts elsewhere when the Australian ballot was adopted, American parties were already unable on their own to meet public expectations with respect to candidate selection. Their failure was most

[8] *See also* Antonin Scalia, The Legal Framework for Reform, Commonsense, vol. 4, no. 2, at 49 (1981) ("We have an accepted governmental tradition of fairly extensive regulation" of political parties' nomination processes, "dating from at least the days of La Follette. . . in the 1900s. . . . . This history is at odds with any view that parties have intrinsic rights to free association that preclude state choice of primary-election structures.").

flagrantly but solely a result of fraud, corruption and other organizational abuses." Epstein at 169.

This is why a State "may insist that intraparty competition be settled before the general election by primary election or by party convention." *Am. Party of Texas v.White*, 415 U.S. 767, 781 (1974) (citing *Storer v. Brown*, 415 U.S. 724, 733-36 (1974)).[9] After all, "States have a major role to play in structuring and monitoring the election process, including primaries . . . . in order to assure that intraparty competition is resolved in a democratic fashion." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (citations omitted). In other words, "the State's interest in enhancing the democratic character of the election process overrides whatever interest the Party has in designing its own rules for nominating candidates." *Lightfoot v. Eu*, 964 F.2d 865, 873 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993). As Justice Oliver Windle Holmes famously observed,

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[9] As the Court explained in upholding the constitutionality of California's "sore loser" provision,

> The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates. The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds.

Storer v. Brown, 415 U.S. 724, 735 (1974) (footnote omitted).

"[t]he Legislature has a right to attach reasonable conditions to that advantage [of ballot listing], if it has a right to grant the advantage." *Com. v. Rogers*, 63 N.E. 421, 423 (Mass. 1902).

A political party's right "to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform" is "circumscribed . . . when the State gives the party a role in the election process." *N.Y. Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 202-03 (2008). This is particularly true because "the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election, even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary, and may thus operate to deprive the voter of his constitutional right of choice." *United States v. Classic*, 313 U.S. 299, 319 (1941). For this reason, the Court has "permitted States to set their faces against 'party bosses' by requiring party-candidate selection through processes more favorable to insurgents, such as primaries." *Lopez Torres*, 552 U.S. at 205. As the late Justice Scalia explained, the State is not constitutionally

> bound to honor a party's democratically expressed desire that its candidates henceforth be selected by convention rather than by primary, or by the party's executive committee in a smoke-filled room.

Tashjian v. Republican Party of Conn., 479 U. S. 208, 237 (1986) (Scalia, J., dissenting).

Nevertheless, a political party enjoys "discretion in how to organize itself, conduct its affairs, and select its leaders." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 230 (1989). SB54 strikes this balance, and leaves these important discretionary functions in the hands of Utah's political parties.

The Utah Supreme Court, on a certified question, has already decided that SB54 "does not require [URP] seek certification as a qualified political party, and it does not purport to mandate the adoption of any provisions in its constitution, bylaws, rules, or other internal procedures." *Utah Republican Party v. Cox*, 2016 UT 17, ¶ 6, 373 P.3d 1286. The fact that "if a party seeks certification as a QPP, it must comply with the statute's requirements. . . . does not amount to internal control or regulation of the party by the State." *Id.; accord Rogers*, 63 N.E. at 423.

The very published opinions in the procedural history of this case that URP omitted from its petition demonstrates the lack of any burden imposed by SB54 on URP. When considering the burdens SB54 imposes on political parties, the district court found, and the Tenth Circuit agreed, that in the face of a system that offered multiple paths to the ballot –one of which URP conceded was unquestionably constitutional– an additional path to the ballot cannot be deemed a burden on URP's constitutional rights. *See Cox*, 177 F. Supp. 3d at 164-71; *see also id.* at n.174 ("URP recognizes that there are at least some URP candidates who have successfully met the signature requirements to

obtain access to the ballot."); *Utah Republican Party v. Cox*, 892 F. 3d 1066, 1087-88 (10th Cir. 2018).[10]

In the first case, URP conceded the RPP path is constitutional. *See Herbert*, 133 F. Supp. 3d 1347 & n.49. URP's choice to have its bylaws out of compliance with state law does not rise to the level of a constitutional concern as to URP's associational rights. This Court should deny the Petition.

Finally, Amici and URP incorrectly claim that the Tenth Circuit's decision in this case could somehow lead states to regulate the internal affairs of other expressive associations despite conceding the *en banc*'s panel's express limitation to the contrary. Pet. at 33-36. This Court should not accept the invitation to follow the imagined parade of horribles. Amici and URP's arguments are irrelevant to the legal questions at hand. Unlike URP and other

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[10] The Tenth Circuit declined to wholly adopt the Second Circuit's "lesson" as a "per se rule" that "provided it is not wholly irrational, an otherwise unconstitutional ballot-access statute will not be struck down so long as there is an alternative, constitutional, method of accessing the ballot." *Cox*, 892 F.3d at 1088 (citing *LaRouche v. Kezer*, 990 F.2d 36, 38 n.1 (2d Cir. 1993)). Instead, the Tenth Circuit looked to this Court's precedent and its own to conclude ballot qualification statutes must be viewed as a whole. *See id*. For example, in *Burdick v. Takashi*, 504 U.S. 428 (1992), the Court upheld Hawaii's ban on write-in voting "in light of the adequate ballot access afforded under Hawaii's election code." *Id.*, at 438-39. *See also Cox*, 892 F.3d at 1088 (citing *Artunoff v. Okla. State Election Bd.*, 687 F.2d 1375, 1378 (10th Cir. 1982)). The Tenth and Second Circuit's conclusions in this regard are in line with this Court's precedent. *See Storer*, 415 U.S. at 737 (declining to examine the rest of California's Elections Code after determining the "sore loser" ban was constitutional).

political parties, the Boy Scouts, the Sierra Club, churches, and other expressive associations do not seek to access election ballots. *See* Richard H. Pildes, The Constitutionalization of Democratic Politics, 118 Harv. L. Rev. 28, 107, 107 n.323 (2004) ("[C]ourts must engage in direct, functional analysis of the role of parties and primaries in American democracy. That analysis is not furthered by reasoning analogically from the Jaycees, the Boy Scouts, the Mormons, or similar religious or civil-society entities" because "the proper 'analogy' to state laws dictating the internal affairs and leadership section mechanisms of civil-society organizations would be the laws regulating internal party structure or the party's choice of organizational leaders, not laws regulating the conditions that must be met for immediate access to the ballot."). As the Tenth Circuit noted:

> URP is not a parish or a club, but rather a political association whose activities run the gamut from purely internal — such as voting on the party platform — to a hybrid internal-external — such as nominating candidates who will appear on the general election ballot in the hopes of being elected to represent not the URP, but the broader citizenry of Utah. The entire point of the Supreme Court's jurisprudence in this area is to recognize that the

> state's ability to regulate the association is not the same in the second instance as it is in the first.

Cox, 892 F.3d at 1079 n.6.

When an association attempts not merely to comment on the political process but to create a political party that proposes candidates for elective office, the First Amendment analysis changes and certain burdens are permitted to preserve the integrity of our election process. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign related disorder.").

Expressive associations merely engaging in the political process enjoy certain privileges that political parties do not. For example, some donors to the Sierra Club can deduct their contributions from their federal income taxes. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544-51 (1983). The same is not true for donors to the Green Party. *See, e.g.,* 26 U.S.C. § 276. Without violating the First Amendment, the law treats the Sierra Club and the Green Party differently, even though they share similar views on environmental issues, because one seeks access to the ballot while the other does not.

URP's and Amici's arguments and proclaimed concerns for other expressive associations are easily dismissed as red herrings in the face of clear, longstanding First Amendment jurisprudence

distinguishing those associations from political parties who seek to access the ballot.

B. URP Calls for Judicial Activism.

URP makes numerous requests in its petition that should give this Court pause. URP's petition is little more than a call for judicial activism. Each of the issues discussed below present a policy decision that is best left to the discretion of the legislative branch of Utah's government, not the judicial branch of the federal government.

First, URP points to Chief Judge Tymkovich's call for review "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 at 12 (quoting Pet at 99a); *see also* Pet. at 25. Yet there is no support for this contention regarding the strength of the party system.[11] When, as here, there are no associational burdens on URP –who remains free to regulate its membership as it sees fit– the policy decisions of how political parties should be permitted to access the Utah primary ballot are best left to the Utah Legislature, not this Court. URP actually acknowledges as much later in its petition when it notes that if the system results in candidates whose views differ from those of a party, "parties can choose to adjust accordingly." Pet. at 26. Yet, URP never explains why this Court should make that

[11] Nor is there any support for the suggestion that the party system is important to our republic's stability. *See generally* Federalist No. 10 (J. Madison), The Federalist Papers at 45-52 (1999) (Clinton Rossiter ed.) (decrying "factions," the proto-political parties of the era).

adjustment for all Utah voters, rather than URP adjusting its membership requirements if it has a true concern about candidates who do not reflect its opinions on issues of the day.

Second, URP argues that its preferred caucus-convention system

> reflects a belief—to which the duly constituted Party is entitled under the First 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.

Pet. at 15-16. On URP's certified question, the Utah Supreme Court has already held that SB54 makes no effort to "mandate the adoption of any provisions in [URP's] constitution, bylaws, rules, or other internal procedures." *Cox*, 2016 UT 17, ¶ 6, 373 P.3d 1286. In the face of such a holding, it is difficult to reconcile how URP candidates who gather signatures from URP members for elective office do not reflect its values. It is also difficult to reconcile why URP cannot regulate its own membership if such members do not reflect the party's values and instead insist on forcing upon Utah an election process that the Utah Legislature has not chosen.

The Constitution does not protect a political party from itself. Under the First Amendment

> although a state's interest in orderly elections allows it to impose reasonable, non-discriminatory restrictions on ballot access, a state may not go to bat for political parties to assure that they remain ballot-qualified. In other words, a state has no interest in regulating political parties for the purpose of helping them win or retain voter support.

Eu, 826 F.2d at 831. The burdens that URP claims do not actually exist. URP's complaints about its members who seek their party's nomination should not give rise to this Court's review of the Utah Legislature's policy decision about how a party and its candidates can access the Utah ballot. As Justice Thomas observed, "[t]o deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result[.]" *Clingman v. Beaver*, 544 US 581, 593 (2005).

Third, obliquely pointing to the election of President Trump, URP argues

> '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.

Pet. at 19. URP then calls into question the loyalty of a URP member duly nominated by its members in a primary election and subsequently elected by the people of Utah—U.S. Representative John Curtis—and argues that "voters will likely see instead . . . 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." Pet. at 20, 26.[12]

Apparently incapable or unwilling to do its own dirty work, URP repeats its calls for the judiciary to help URP regulate its membership. *See Cox*, 178 F. Supp. 3d at 183-84. URP retains the right to set membership requirements that also ensure its candidates are loyal to URP and its views since SB54 still permits URP to require that its candidates and those who sign its candidates' petitions be members of the URP. If URP chooses not to implement such requirements, that is its choice. In short, URP

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[12] In 2018, Rep. Curtis opted to both gather signatures and participate in URP's convention. *See* Jan. 2, 2018 Notice of Intent to Gather Signatures *available at* https://tinyurl.com/ydyau65q, Mar. 12, 2018 Declaration of Candidacy *available at* https://tinyurl.com/y996a7vj. While he gathered enough valid signatures to qualify for the primary ballot, Rep. Curtis was unable to garner sufficient support at the convention to become the party's nominee via the convention route. *See* https://elections.utah.gov/2018-candidate-signatures; Lisa Riley Roche and Dennis Romboy, "Utah GOP delegates force primary elections for Mitt Romney, John Curtis" Deseret News, April 21, 2018. Rep. Curtis ultimately prevailed in the URP primary and in the general election this November.

already has "the tools necessary to ensure . . . candidates' loyalty to the party that nominates them." Pet. at 19.

URP's own internal disagreements do not give rise to a question of constitutional significance. If a candidate does not reflect URP values, URP can revoke that candidate's membership. This Court should not accept URP's invitation to meddle in Utah's election process. URP could solve all of the "problems" URP identifies through its own internal procedures that SB54 does not regulate in any way.

C. In Their Calls for Judicial Activism, Amici Misapprehend the Record, SB54, and this Court's First Amendment Jurisprudence Regarding Political Parties.

Without citation to any evidence, Amici boldly proclaim that the purpose of SB54 was to force URP to nominate more moderate candidates. As discussed in Part I *supra*, the District Court found that there were no undisputed material facts to support this assertion. URP failed to prove this allegation of viewpoint discrimination both in the first and second case.

Amici similarly fail to engage substantively with over four decades of stare decisis that establishes political parties are different than other expressive associations because they want to access the ballot and the careful balancing test the Court created to weigh the conflicting interests of the state and the political party. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460

U.S. 780, 789 (1983). The Court is not obliged to toss out the baby with the bathwater merely because Amici dislike the rulings of the Ninth and Tenth Circuits. *See Utah Republican Party v. Cox*, 892 F. 3d 1066 (10th Cir. 2018); *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119 (9th Cir. 2016), *cert. denied*, 137 S.Ct. 2114 (2017); *Alaskan Indep. Party v. Alaska*, 545 F.3d 1173 (9th Cir. 2008).

Given the complete lack of evidence to support claims of viewpoint discrimination, Amici's requests further highlight that their true wish is to wield the First Amendment as a sword to achieve things contrary to the will of the Utah Legislature—which overwhelmingly consists of URP members—and the URP membership itself, which in primary after primary chose the signature gatherer over the candidate who opted to pursue the convention-only route.[13] It an extreme anti-democratic position unsupported by any legal authority.

This Court "permitted States to set their faces against 'party bosses' by requiring party-candidate selection through processes more favorable to insurgents, such as primaries." *Lopez Torres*, 552

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[13] It is worth noting that some of the Amici, as current and former officials elected by the people of Utah, could have intervened below but chose not to, and one Amicus even took advantage of the Signature Gathering Provision—U.S. Sen. Mike Lee. Sen. Lee, who is not shy about expressing his opinion that certain statutes are unconstitutional in his view, made a contrary statement in 2016 when he exercised his rights under the Either or Both Provision and gathered signatures to ensure his place on the primary ballot. *See* Emily Larson, "Less than 15 percent of candidates took signature-gathering path to primary ballot" Deseret News, April 22, 2016.

U.S. at 205. It does not permit losing candidates (or interest groups) to use the judiciary under the guise of the First Amendment to change the nomination rules when those rules fail to achieve their preferred results. *See id.*

In SB54, the Utah Legislature crafted a comprehensive, reasonable, and viewpoint neutral set of amendments to the Election Code designed to increase candidate and electorate participation in the state's primary elections. Since their policy decision was well within the bounds of established precedent, it should be respected, not judicially repealed.

VIII. CONCLUSION

Based on the foregoing, and for the reasons stated by the LG, URP's petition should be denied.

DATED this 29th day of January, 2019.

Respectfully submitted:

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