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 IN OPPOSITION OF RESPONDENT UTAH LT. GOVERNOR SPENCER J. COX

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QUESTION PRESENTED

May a State, consistent with the First Amendment, prescribe political party nominations by primary election?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

RULE

OTHER AUTHORITIES

INTRODUCTION

For nearly 50 years, this Court has repeatedly recognized the States' power to prescribe political party nominations by primary elections. Not once has this Court—or any other court—cast constitutional doubt on that practice. In fact, because this Court's precedents speak so uniformly, "[n]early every State in the Nation now mandates that political parties select their candidates for national or statewide office by means of primary elections." *Clingman v. Beaver*, 544 U.S. 581, 599 (2005) (O'Connor, J., concurring in part and concurring in the judgment).

The cases recognizing that power explain why States have it. "States have a major role to play in structuring and monitoring the election process, including primaries." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). And "when the State gives the party a role in the election process"—such as "the right to have their candidates appear with party endorsement on the general-election ballot"—the State "acquires a legitimate governmental interest in ensuring the fairness of the party's nominating process, enabling it to prescribe what that process must be." *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 203 (2008).

Beyond that, this Court has endorsed the democratic benefits from the States' use of primaries. When States prescribe primary elections, they provide "an ideal forum in which to resolve" "intraparty feuds." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 227 (1989). During a primary, "contending forces within the party employ the primary campaign and primary election to finally settle their differences."

Storer v. Brown, 415 U.S. 724, 735 (1974). Primary elections thus "assure that intraparty competition is resolved in a democratic fashion." *Jones*, 530 U.S. at 572. And primaries allow more voters to vindicate their "individual right to associate with the political party of one's choice and to have a voice in the selection of that party's candidate for public office." *Lopez Torres*, 552 U.S. at 211 (Kennedy, J., concurring in the judgment) (citing *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)).

Petitioner Utah Republican Party asserts a First Amendment right to nominate candidates by convention rather than by the State-mandated primary. Those cases, however, stand in its way. So it now asks this Court to repudiate them. But the Party provides no certworthy reason to do so.

Most important, and as the Party concedes (Pet. 1, 27), no circuit split exists. The two circuits that have answered this question agree: Mandatory primary elections pass constitutional muster.

Nor do the Party's proffered justifications for splitless review withstand scrutiny. The Tenth Circuit correctly applied this Court's primary-election precedents. Concluding otherwise would require overruling or disavowing a host of this Court's cases from the past five decades, imperiling *every State's* election laws in the process. And the Party's proposed work-around—its claim that this case is unique in American jurisprudence because the Utah Legislature instituted primary elections to alter the Party's viewpoint—misstates the record.

The Court should deny the petition.

STATEMENT

In 2008, eight Justices joined an opinion reiterating that States may require political parties to select their general-election candidates by primary election. The opinion repeated the point four times:

First, the Court called it "'too plain for argument' that a State may prescribe party use of primaries or conventions to select nominees who appear on the general-election ballot." *Lopez Torres*, 552 U.S. at 203 (quoting *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974)).

Second, the Court said that it "ha[s], as described above, permitted States to set their faces against 'party bosses' by *requiring* party-candidate selection through processes more favorable to insurgents, *such as primaries*"—emphasizing again that "the State can *require* this." *Id.* at 205 (emphasis added).

Third, the Court reiterated that selecting general-election nominees "by convention has been a traditional means of choosing party nominees," but "a State may determine it is not desirable and replace it" with a primary. *Id.* at 206-07.

Fourth, after recounting New York's history of switching from primary elections to conventions to choose political parties' judicial nominees, *id.* at 199-200, the Court said that if New York "wishes to return to the primary system that it discarded in 1921, it is free to do so." *Id.* at 209.

I. UTAH ACCEPTED THIS COURT'S INVITATION AND NOW PRESCRIBES NOMINATIONS BY PRIMARY ELECTION.

Soon after *Lopez Torres*, the Utah Legislature reached a crossroads. From late 2013 through early 2014, a group called Count My Vote spent more than $1 million to gather signatures from more than 100,000 Utah voters on a ballot initiative that would have eliminated Utah's caucus-and-convention system for nominating candidates, replacing it with a primary-only nomination system. *See* Pet. App. 26a & n.15 & cited sources. A party's candidates could have qualified for the primary ballot only by gathering signatures on a nominating petition.

Rather than let Count My Vote outflank it, the 2014 Utah Legislature passed Senate Bill 54. That law embodies a "grand compromise" designed "to maintain the [Party's] traditional caucus system as a path onto the primary ballot." *Id.* at 19a.

SB54 does two things relevant here. First, taking *Lopez Torres* at its word, SB54 institutes primary elections as the way political parties nominate their general-election candidates. Utah Code § 20A-9-403(1)(a).

Second, SB54 prescribes how candidates qualify for the primary-election ballot. Candidates of a "registered political party" qualify only by gathering signatures on a nominating petition. *Id.* § 20A-9-403(3)(a)(ii).

But candidates of a "qualified political party" may qualify for the primary ballot using "either or both" of two procedures. *Id.* § 20A-9-101(12)(c) (the "Either or Both Provision"). First, they may gather signatures

from party members on a nominating petition. *Id.* § 20A-9-408. Second, they may seek the party's nomination through the party's convention. *Id.* § 20A-9-407. Or they may simultaneously do both. *Id.* § 20A-9-406(3).

SB54 gives political parties full control over who participates in their nomination processes. The default rule is one of exclusion: Unless a party expressly permits otherwise, only its members may seek its nomination, *id.* § 20A-9-403(8), or sign a candidate's nominating petition, *id.* §§ 20A-9-403(2)(a)(ii); 20A-9-408(b)(i)-(vi). And qualified political parties control who participates in their nominating conventions. *See id.* §§ 20A-9-101(12)(c)(i); 20A-9-407.

To eliminate doubt, the Legislature codified its purposes for instituting primary elections. Courts should "liberally" construe SB54, and all other primary-election laws, "to ensure full opportunity for persons to become candidates and for voters to express their choice." *Id.* § 20A-9-401(1). In doing so, courts may not construe SB54 "to govern or regulate the internal procedures of a registered political party." *Id.* § 20A-9-401(2).

II. THE UTAH REPUBLICAN PARTY UNSUCCESSFULLY CHALLENGES SB54.

Before SB54, Utah law allowed Petitioner Utah Republican Party to select its general-election candidates by convention. Party members gathered at neighborhood caucus meetings to choose delegates; those delegates then gathered at the Party's convention to nominate candidates. Under the Party's bylaws and constitution, if a candidate received 60 percent or more

of the delegates' votes (or ran unopposed), that candidate would become the party's general-election nominee. But if no candidate in a contested race cleared that threshold, the two candidates with the highest delegate-vote totals proceeded to a Republican primary. *See* Pet. App. 3a.

The Party sees SB54's nominations-by-primary-election reforms and Either or Both Provision as infringing its First Amendment right of association. It has twice sued to invalidate the Either or Both Provision on those grounds. Each attempt failed.

A. The Party first challenged SB54's constitutionality in late 2014. After expedited discovery and briefing, the district court rejected all the Party's claims but one. It agreed with the Party only that a former provision of SB54 requiring qualified political parties to open their primary elections to nonmembers (the "Unaffiliated Voter Provision") violated this Court's holding in *Jones*. *See Utah Republican Party v. Herbert*, 144 F. Supp. 3d 1263, 1271-83 (D. Utah 2015) (holding unconstitutional Utah Code § 20A-9-101(12)(a) (2015)). The State did not appeal from that judgment.

B. When the first lawsuit ended, the Lieutenant Governor stated his intent to enforce SB54. The Party responded by challenging SB54 again. This petition for a writ of certiorari arises from this second lawsuit.

As relevant, the district court granted summary judgment for the State on the Party's claim that the Either or Both Provision violated the First Amendment. Pet. App. 158a-182a.The court held that the Either or Both Provision did not impose a severe burden on the Party's right of association and was

justified by the State's important interests in managing elections in an orderly manner, increasing voter participation, and increasing access to the ballot. *See id.*

In reaching that holding, the district court expressly found that "[t]he Undisputed Material Facts do not show that" the Legislature passed SB54 to "target[] or single[] out" the Party "because of its 'extreme' viewpoints." *Id.* at 180a. "[T]his argument makes no sense" because a "majority of the members of the Utah Legislature are members of the [Party] and it is hard to believe that they would target their own party or the viewpoints their party advances." *Id.*

C. The Tenth Circuit affirmed by a 2-1 vote. *See* Pet. App. 10a-31a.

1. The court of appeals upheld the Either or Both Provision under "the now-familiar *Anderson*/*Burdick* balancing test," *id.* at 12a, weighing the Party's alleged injuries from SB54 against the State's interests justifying the law, *id.* at 13a-31a.

a. The court first held that the Either or Both Provision "is at most only a minimal burden on the [Party's] First Amendment associational rights." *Id.* at 25a-26a. It recognized that resolving the Party's challenge to SB54's prescription for how it "selects its nominee to appear on the general election ballot" required "balanc[ing]" the "legitimate constitutional interests" of "both the political party and the state." *Id.* at 13a. It expressly acknowledged *Jones*'s teaching that parties have an associational right to select their nominees. *Id.* at 13a-14a.

Yet the court recognized that "the heart of this case" is the "distinction between wholly internal aspects of party administration on one hand and participation in state-run, state-financed elections on the other." *Id.* at 14a. The State has "no . . . interest" in a party's decisions about its "platform, its Chairman, or even whom it will endorse in the upcoming election." *Id.* But the State has "a manifest interest" in "the party's actions [that] turn outwards to the actual nomination and election of" political candidates "who will swear an oath not to protect the Party, but instead to the Constitution." *Id.* The court faulted the dissent for "blur[ring] this distinction between the party's internal and external activity." *Id.*

The court explained that this Court has "consistently" distinguished "between a party's internal mechanisms and its external manifestations." *Id.* at 15a. The paradigm example of a party's external activity is its involvement in the State-administered general election: "'when the State gives the party a role in the election process,'" such as "'by giving certain parties the right to have their candidates appear with party endorsement on the general-election ballot,'" the party's associational rights "'are circumscribed.'" *Id.* (quoting *Lopez Torres*, 552 U.S. at 202-03). For this reason, during the last five decades this Court three times has recognized the States' power to prescribe nominations by primary election. *Id.* at 17a (citing *White*, 415 U.S. at 781; *Jones*, 530 U.S. at 572; *Lopez Torres*, 552 U.S. at 205). And "even beyond" those consistent statements, this "Court has explicitly upheld a State's ability to regulate the *scope* of a party primary," such as by limiting a primary to registered

party members and independents. *Id.* at 19a. (citing *Clingman*, 544 U.S. at 590).

SB54 resembles the laws upheld in those cases, the court reasoned. "SB54 does not regulate the party's internal process." *Id.* Since the Party's first lawsuit, when the district court "excised" SB54's Unaffiliated Voter Provision, "the law no longer proscribes the [Party's] authority to exclude unwanted members from its primary." *Id.* "Following the first lawsuit, SB54 is perfectly compliant with the holding in *Jones*." *Id.* at 25a. And "nothing in SB54 prevents the [Party] from endorsing the candidate of its choice and using traditional advertising channels to communicate that endorsement to the state's voters." *Id.* at 19a.

b. The court of appeals next held that "the State's important interests of managing elections in a controlled manner, increasing voter participation, and increasing access to the ballot," *id.* at 26a (internal quotation marks omitted), justified the Either or Both Provision, *id.* at 30a. This Court's prior cases have "accepted similar articulations of a state's interest in regulating elections." *Id.* at 28a (citing *Crawford v. Marion Cty. Election Bd.*, 544 U.S. 181, 191 (2008); *Clingman*, 544 U.S. at 593-94; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)). Those interests protect "the very backbone of our constitutional scheme—the right of the people to cast a meaningful ballot." Pet. App. 28a.

c. The court of appeals balanced those interests and concluded that "the State interests in SB54 surely predominate over the minimal burdens imposed" on the Party. *Id.* at 30a. The court thus affirmed "the district court's holding that the Either or Both Provision is a

constitutional exercise of the State's regulatory authority." *Id.* at 31a.

2. Chief Judge Tymkovich dissented. He would have held that the Either or Both Provision severely burdens the Party's right of association and is not justified by the State's interests. *See id.* at 63a-93a.

3. The court of appeals denied the Party's petition for rehearing or rehearing en banc with no judge calling for a vote. *Id.* at 97a-98a.

REASONS FOR DENYING THE PETITION

I. THE PETITION DOES NOT MERIT PLENARY REVIEW.

The petition establishes no "compelling reason[]" to review the Tenth Circuit's decision. S. Ct. R. 10.

Most important, the Party concedes (Pet. 1, 21, 27) that the circuits have not split over whether States may prescribe party nominations by primary election. The Tenth Circuit's opinion accords with the only other circuit opinion squarely addressing this question. *Alaska Independence Party v. Alaska*, 545 F.3d 1173 (9th Cir. 2008); *see* Pet. 21. It also accords with other circuits' views of this Court's precedent.[1] By itself, the lack of a split justifies denying the petition.

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[1] *See, e.g.*, *6th Cong. Dist. Republican Comm. v. Alcorn*, — F.3d —, 2019 WL 138678, *5 (4th Cir. Jan. 9, 2019) ("Primaries add a crucial participatory dimension to democratic politics. . . . If [the challenged Virginia statute] truly were a mandatory primary statute its constitutionality would be 'too plain for argument.'" (quoting *Jones*, 530 U.S. at 572)).

Mindful of that problem, the Party suggests that this "Court routinely grants review of decisions threatening the autonomy of political parties without waiting for" a circuit split. Pet. 27 (citing *Clingman* and *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008)). But petitions presenting questions about political parties' association rights do not get a free pass to plenary review. They too must clear a searching certworthiness inquiry. The Court's orders routinely *denying* those types of petitions—even when they allege a split—confirm as much.[2]

In reality, *Clingman* and *Washington State Grange* only hurt the Party's cause. The Court did not grant those splitless petitions because the underlying decisions threatened political parties' autonomy. Just the opposite: Those cases merited plenary review because each court of appeals' judgment declared a State law unconstitutional. "[F]ederal courts must take great care" when exercising their "power to invalidate a state law" because such decisions "implicate[] sensitive federal-state relations." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2351 (2016) (Alito, J., dissenting). *Clingman* and *Washington State Grange* thus warranted an exercise of this Court's supervisory power—an appropriate response to a judgment "cast[ing] doubt on the semiclosed primary laws of 23 other States." *Clingman*, 544 U.S. at 586.

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[2] *See, e.g.*, *Democratic Party of Haw. v. Nago*, No. 16-652 (cert. denied May 15, 2017) (alleging split); *Wash. State Democratic Cent. Comm. v. Wash. State Grange*, No. 11-1263 (cert. denied Oct. 1, 2012) (not alleging split); *Libertarian Party of Wash. State v. Wash. State Grange*, No. 11-1266 (cert. denied Oct. 1, 2012) (not alleging split); *Rogers v. Cortes*, No. 06-1721 (cert. denied Oct. 1, 2007) (alleging no split but a misapplication of *Jones*).

Worse yet for the Party, this Court *reversed* each court of appeals' judgment, thereby *reinstating* both challenged primary-election laws. *Clingman* and *Washington State Grange* thus are instructive—as to why the petition should be denied.

At bottom, then, the petition merely echoes the dissent's suggestion that "[t]he time appears ripe for the Court to reconsider (or, as [the dissent] see[s] 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." Pet. App. 99a-100a. Neither circumstance, however, warrants further review.

Take the latter suggestion first. If the petition really does present questions that the Court should "consider for the first time," *id.*, granting certiorari now would depart from this Court's "recogni[tion] that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). Letting other courts consider the dissent's lone views before this Court weighs in will "yield a better informed and more enduring final pronouncement" on them. *Id.*

The alternative suggestion—that the "time appears ripe for th[is] Court to reconsider" its primary-election precedents, Pet. App. 99a—more accurately captures the Party's arguments. But it too does not justify granting the petition.

To be sure, sometimes this Court's cases need a fresh look. *See, e.g.*, *Kisor v. Wilkie*, No. 18-15 (cert. granted Dec. 10, 2018). Yet this Court typically agrees to reconsider well-established precedent only after years of opinions from this Court and multiple other courts identifying potential flaws in the challenged precedent. *See, e.g.*, Br. for States of Utah et al. as *Amici Curiae* Supporting Pet'r at 4-5, *Kisor v. Wilkie*, No. 18-15 (Aug. 1, 2018) (identifying six of this Court's opinions and five courts of appeals opinions, from 2011 to 2018, that explain problems with *Auer* deference).

This petition charts a course diametrically opposed to that usual one. The Party asks the Court to upend nearly a half century of its uniform precedents, and imperil the candidate-nomination procedures of *every State*, based solely on one dissenting opinion from one court of appeals. The petition cites no case taking that anomalous, quick-draw tack to reconsidering five decades of settled precedent.

That is not surprising. "Overruling precedent is never a small matter." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). *Stare decisis* "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* (internal quotation marks omitted).

Those concerns apply with special force here. For over 100 years, almost every State has prescribed some

form of primary election.[3] But "nothing about" that practice or this Court's precedents approving it "has proved unworkable." *Id.* at 2411. Indeed, if primary elections really produce "a series of Manchurian Candidates" who capture electoral politics (Pet. 26), the Party surely could have cited at least *one* such example among the untold thousands of candidates nominated by primary election since that became the near-universal American practice more than a century ago. Yet the Party offers none.

In short, the petition does not meet any of Rule 10's criteria for plenary review. That warrants denying the petition without considering the merits of the Tenth Circuit's holding.

But even if the merits were relevant, they also cut against plenary review. The Tenth Circuit correctly applied five decades of this Court's settled primary-election cases, as Respondent shows in the next section. This Court's scarce resources have better uses than confirming that the Tenth Circuit properly upheld a process by which voters in nearly every State have nominated candidates since before Henry Ford introduced the Model T.

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[3] Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 Colum. L. Rev. 873, 877 n.10 (2000) (stating "that by 1899, two-thirds of the states had primary legislation," and "[b]y 1905, 43 states had enacted some form of primary election law"). Recall that in 1905 our Nation comprised only 45 States.

II. THE TENTH CIRCUIT'S DECISION IS CORRECT.

A. This Court's Primary-Election Cases Establish Clear, Workable Rules.

1. This Court has established clear rules about the States' constitutional power to regulate elections and political parties' First Amendment association rights.

The "Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl.1, which power is matched by state control over the election process for state offices." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). That constitutional fact compels the "[c]ommon-sense . . . conclusion that government must play an active role in structuring elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

In fact, "States may, and inevitably must, enact reasonable regulations of *parties, elections, and ballots* to reduce election- and campaign-related disorder." *Timmons*, 520 U.S. at 358 (emphasis added). Indeed, "'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.'" *Burdick*, 504 U.S. at 433 (quoting *Storer*, 415 U.S. at 730).

On the other hand, it is "well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments." *Eu*, 489 U.S. at 224. That right of association, with its accompanying "right to exclude," applies specifically to the party's "process of selecting its nominee." *Jones*, 530 U.S. at 575.

2. Two lines of this Court's cases model how courts should resolve any alleged tension between parties' associational rights and States' constitutional power over elections.

a. First, 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"—such as "the right to have their candidates appear with party endorsement on the general-election ballot." *Lopez Torres*, 552 U.S. at 202-03. When a State does so, it "acquires a legitimate governmental interest in ensuring the fairness of the party's nominating process, *enabling it to prescribe what that process must be*." *Id.* at 203 (emphasis added).

Since 1974, the Court has said in at least three cases that a State may prescribe primary elections as a party's nominating process:

- The Court first called it "too plain for argument" that a State "may *insist* that intraparty competition be settled before the general election by primary election or by party convention." *White*, 415 U.S. at 781 (emphasis added).
- "We have considered it 'too plain for argument' . . . that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *Jones*, 530 U.S. at 572 (quoting *White*, 415 U.S. at 781).

- "We have, for example, considered it to be 'too plain for argument' that a State may prescribe party use of primaries or conventions to select nominees who appear on the general-election ballot." *Lopez Torres*, 552 U.S. at 203 (quoting *White*, 415 U.S. at 781).

b. Second, though this Court has never questioned the States' power to prescribe primary elections, it has acknowledged that the States' "prescriptive power is not without limits." *Id.* at 203. Several cases mark the boundaries between political parties' associational rights and State power in this context.

It is now settled that States cannot force parties to let "non-party-members . . . determine" the party's general-election candidate. *Id.* Forcing parties "to adulterate their candidate-selection process—the 'basic function of a political party'—by opening it up to persons wholly unaffiliated with the party" severely burdens parties' associational rights. *Jones*, 530 U.S. at 581 (quoting *Kusper*, 414 U.S. at 58).

Similarly, States cannot prohibit political parties from endorsing candidates. *Eu*, 489 U.S. at 216-17; 222-29. Nor can States regulate parties' "internal affairs." *Id.* at 218. That means States cannot "dictate the size and composition of the state central committees"; or set rules for "the selection and removal of" party leaders; or prescribe how long those leaders serve, or where they live, or how often they meet. *Id.* at 218-19. Those types of laws violate the First Amendment because they impermissibly "involve[] direct regulation of a party's leaders." *Id.* at 231-32.

In contrast, this Court has repeatedly upheld State election "laws necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections." *Id.* at 232. It rejected a political party's challenge to Minnesota's rule prohibiting parties from nominating "fusion" candidates—one candidate nominated by two parties. *Timmons*, 520 U.S. at 357-63. It rejected a political party's challenge to Oklahoma's "semiclosed primary system, in which a political party may invite only its own party members and voters registered as Independents to vote in the party's primary." *Clingman*, 544 U.S. at 584. It rejected a challenge to a Washington law changing minority parties' nominating process from a convention to a primary—and requiring minority candidates to win a minimum amount of support in the primary to access the general-election ballot. *Munro v. Socialist Workers Party*, 479 U.S. 189, 191-92, 199 (1986). And it rejected a candidate's challenge to a New York law prescribing nominations by convention—while noting four times that States can "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 (emphasis added).

B. The Tenth Circuit Correctly Applied Those Rules.

No error exists in the court of appeals' opinion applying this Court's precedents.

Utah law gives the Party the right to have its name "printed next to [its] candidates on the general election ballot." Pet. App. 3a (citing Utah Code § 20A-6-301(1)(d)). Utah's decision to give the Party that right

"enabl[es]" Utah "to prescribe what" the Party's nominating "process must be." *Id.* at 15a (quoting *Lopez Torres*, 552 U.S. at 203).

Utah prescribed primary elections as the nominating process—just as *White*, *Jones*, and *Lopez Torres* expressly contemplate. *Id.* at 15a-19a. And Utah's primary-voter participation rules defer to party preferences even more than the semi-closed primary rules upheld in *Clingman*. *Id.* at 19a. In Utah, political parties retain exclusive control over who votes in their primaries, and the Party closes its primary to nonmembers. That's why SB54 "is perfectly compliant with the holding in *Jones*"—the Party's "nominee is decided only by those individuals who have chosen to associate with the Party." *Id.* at 25a.

Nor does SB54 "regulate the party's internal process" like the California laws *Eu* struck down. *Id.* at 19a. SB54 does not dictate what the Party's official governing bodies shall be; or limit the Party's right to endorse candidates; or dictate the size, composition, location, or maximum term of the Party's committees or leaders. *See id.* (citing *Eu*, 489 U.S. at 222-29).

"'[M]anaging elections in a controlled manner, increasing voter participation, and increasing access to the ballot'" are "important [State] regulatory interests" justifying SB54. Pet. App. 26a. "Those state interests constitute the very backbone of our constitutional scheme—the right of the people to cast a meaningful ballot." *Id.* at 28a; *see Kusper*, 414 U.S. at 58 ("A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that [party's candidate-]selection process.").

The court correctly balanced those interests to conclude that Utah's "interests in SB54 surely predominate over the minimal burdens imposed" on the Party. Pet. App. 30.

That holding—and the reasoning supporting it—accords precisely with this Court's precedent.

C. The Party Misreads This Court's Precedent and Misstates the Record.

The Party's view that the opinion below nevertheless contravenes this Court's cases does not withstand scrutiny.

The Party principally contends (Pet. 14-29) that the opinion below runs afoul of *Jones*. That contention rests on two false premises. First, the Party misreads *Jones*, erroneously conflating SB54 with California's blanket partisan primary. Second, the Party mischaracterizes the record about the Utah Legislature's purpose for passing SB54.

1. *Jones* Recognizes a Party's Right to Exclude Nonmembers from the State-Prescribed Process—Not a Right to Override That Process.

The Party reads *Jones* as rebuffing a State's "attempt[] to manipulate *who* chooses the party's representatives." Pet. 15. That is true insofar as *Jones* goes—it correctly held that California could not force parties "to open[]" their candidate-selection process "to persons wholly unaffiliated with the party." 530 U.S. at 581. That holding hinged on "the political association's right to exclude," *id.* at 575, because "a party's right to exclude is central to its freedom of association, and is

never 'more important than in the process of selecting its nominee,'" *Wash. State Grange*, 552 U.S. at 445 (quoting *Jones*, 530 U.S. at 575).

That is precisely why *Jones* is not "like this case," as the Party contends. Pet. 15. Unlike California's blanket partisan primary, SB54 does not force parties to include non-party-members when selecting their nominees. Instead, under SB54 parties have full freedom to exclude nonmembers from their nomination process. And the Party exercises that right—it closes its primary to everyone but registered party members. In Utah, only registered Republicans choose Republican candidates. Pet. App. 25a.

Yet the Party still contends that "*Jones*' logic forecloses the Tenth Circuit's holding." Pet. 15. That's correct only if *Jones* establishes a party's right to exclude both non-party-members *and its own members* from a State-prescribed nomination process. *Jones*, however, expressly rejects that premise.

Jones "recognized, of course, that States have a major role to play in structuring and monitoring the election process, *including primaries*." 530 U.S. at 572 (emphasis added). *Jones* then emphasized that this Court "consider[s] it 'too plain for argument,' for example, that *a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion*." *Id.* (emphasis added).

Beyond that, the Party's contention cannot be reconciled with the remedy *Jones* prescribed. That remedy was not a convention. Instead, *Jones* held that

California could establish (and so it has) *another primary*—a nonpartisan blanket primary. *See id.* at 585-86. *Jones* thus does not support the Party's quest to place its convention-only nominees directly on the general-election ballot. Instead, *Jones expressly preserves* a State's power to interpose a primary election between a party's nomination process and the general election.

The Tenth Circuit is right: "SB54 is perfectly compliant with the holding in *Jones*." Pet. App. 25a. That conclusion is the only one true to all of "*Jones*' logic," Pet. 15—including the italicized text two paragraphs above—and to *Jones*'s remedy.

2. Other than Statutory Text, the Record Contains No Evidence of Legislative Purpose.

The Party also insists that SB54 fails under *Jones* because the Utah Legislature adopted it "for the viewpoint-based purpose of avoiding candidates with 'extreme views.'" Pet. i; *see also id.* at 5, 27. In fact, according to the Party, "the *undisputed* record shows that SB54's proponents indeed sought to affect the *type* of candidates a party chooses." *Id.* at 18.

That contention fails on at least five levels.

a. To begin, the Party's contention contradicts the district court's express finding that the "Undisputed Material Facts do not show that" the Legislature passed SB54 to "target[] or single[] out" the Party "because of its 'extreme' viewpoints." Pet. App. 180a. The section of the Party's Tenth Circuit brief trying to challenge this finding did not cite even *one* page in the record. *See* Br. of Aplt. at 47-48, *Utah Republican Party*

v. Cox, No. 16-4091 (10th Cir. Dec. 13, 2016). Because "[t]his Court . . . is one of final review, 'not of first view,'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)), the Party's utter failure to point the Tenth Circuit to any evidence contradicting the district court's finding forecloses its argument here.

b. Should the Court nevertheless choose to inquire further, note the Party's carefully crafted assertion of viewpoint discrimination by "SB54's *proponents*." Pet. 18 (emphasis added). By blaming an undifferentiated mass of "proponents," the Party glosses over the critical distinction between the Utah Legislature (which passed SB54) and Count My Vote, whose efforts brought SB54's reforms to the fore.

The Party's arguments disregard that distinction between the State and a private actor. It conflates the Utah Legislature with Count My Vote, or uses the passive voice to allege a nefarious viewpoint-altering purpose without identifying *who had* that purpose. This occurs most glaringly when the Party directs the Court to "[e]vidence of Count My Vote's and the legislature's intent," Pet. 15 n.4, and recurs throughout the petition.[4]

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[4] *See, e.g.*, Pet. 1 (contending that Count My Vote "persuaded the legislature to enact a law—known as SB54—expressly designed to influence" the Party's nominees); *id.* at 6 ("The evident purpose of Count My Vote and SB54 was thus to change the views and messages of the Party and its candidates."); *id.* at 23 ("SB54 was *designed* to influence the types of candidates ultimately selected by the Party").

But Count My Vote is not the Utah Legislature. Allegations about *Count My Vote's* purpose—or the purpose of an unidentified person—are irrelevant.

c. That leads directly to the Party's third error: It cites *no record evidence* of the *Legislature's* purpose. Instead, the "evidence" the Party cites consists only of statements by or about Count My Vote, or individual legislators' floor statements, or extrarecord material.

By Respondent's count, the Party cites four sources to establish purported record evidence of legislative purpose: (1) individual legislators' floor statements about SB54 (Pet. 7 n.2, 8 n.3, and 17 n.6); (2) the dissenting opinion below (*id.* at 6, 7 n.2, and 15 n.4); (3) the Tenth Circuit Joint Appendix (*id.* at 15 n.4); and (4) the Party's Tenth Circuit Supplemental Appendix (*id.* at 6 and 15 n.4). Consider each in turn.

(1) An individual legislator's floor statement does not constitute evidence of legislative purpose. Courts "derive[]" "legislative intent" from "the language and structure of the statute itself," *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997), always "look[ing] first to" the statute's "language" and "giving the words used their ordinary meaning," *Lawson v. FMR LLC*, 571 U.S. 429, 440 (2014) (internal quotation marks omitted). For what a legislature "ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017). That's why "the views of a single legislator, even a bill's sponsor, are not controlling." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 385 (2012).

Here, statutory text confirms legislative purpose: SB54 "shall be construed liberally so as to ensure full opportunity for persons to become candidates and for voters to express their choice," Utah Code § 20A-9-401(1), and "may not be construed to govern or regulate the internal procedures of a registered political party," *id.* § 20A-9-401(2).

In any case, the individual legislator's statement that troubles the Party does no more than parrot this Court's precedent. The Party wants this Court to strike down SB54 because a legislator observed that a primary election would create intraparty races between "competing philosophies." Pet. 7. But *Storer* upheld California's primary-election law after expressly endorsing "[t]he State's general policy . . . to have contending forces within the party employ the primary campaign and primary election to finally settle their differences." 415 U.S. at 735.

(2) The dissenting opinion's reasoning finding fault with that same individual floor statement (Pet. App. 69a n.12) is flawed for those same reasons.

The Party also invokes (Pet. 6) the dissent's reliance on six pages from Count My Vote's website. Pet. App. 66a n.9 (citing two pages); *id.* at 69a n.12 (citing one page); *id.* at 80a n.20 (citing three pages). Those pages fare no better—Count My Vote is not the Utah Legislature. And statements on Count My Vote's website are not part of SB54. Even if those six cited webpages existed in 2014, and the Party does not show that they did, the Legislature never voted on them and the Governor never signed them.

The Party next repeats (Pet. 6) the dissent's reliance on three pages from the Tenth Circuit Joint Appendix, consisting of three pages from the Party's 2014 verified complaint challenging SB54. *See* Pet. App. 66a n.9 (citing CA10 JA 57-59). In the Tenth Circuit, a district court can "treat a verified complaint as an affidavit for purposes of summary judgment if it satisfies the standards for affidavits set out in" the civil rules, including that the allegations "must be made on personal knowledge." *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1019 (10th Cir. 2002) (internal quotation marks omitted). The allegations in the Party's verified complaint fail that test. They describe interactions between only two private groups—the Party and Count My Vote—in the build-up to the 2014 Utah legislative session. Then those allegations merely state "*the Party['s] understand[ing]* that organizers of Count My Vote and Utah lawmakers struck what was characterized as a 'Grand Compromise' to enact" SB54. CA10 JA 59 (emphasis added). That's hardly evidence of *legislative* purpose.[5]

(3) The Party cites one page from the Tenth Circuit Joint Appendix. *See* Pet. 15 n.4 (citing CA10 JA 45). That is a page from the Party's 2014 verified complaint in the first lawsuit, asserting only that "[t]hose responsible for SB54 have admitted that the intent of the law was not viewpoint neutral"—and citing a Count My Vote website to support that assertion. CA10 JA 45. That suffers from the same evidentiary shortcomings identified above.

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[5] The Party also cites to page 79a of the dissent (Pet. 15 n.4), but page 79a does not contain any cites to the record.

(4) Finally, the Party twice cites its Tenth Circuit Supplemental Appendix. First, it cites two pages from its former chairman's declaration in its first lawsuit. Pet. 6 (citing CA10 Supp. App. 70, 72). But those pages merely repeat the former chairman's understanding of Count My Vote's purported purpose. Second, the Party cites a page from its amended motion for preliminary injunction that is plainly argument—not evidence. *Id.* at 15 n.4 (citing CA10 Supp. App. 55).

Respondent has analyzed the Party's purported evidence of the Utah Legislature's purpose at this level of granularity to discharge his duty to "address any perceived misstatement of fact . . . in the petition that bears on what issues properly would be before the Court if certiorari were granted." S. Ct. R. 15.2. This case gives this Court no chance to address the constitutionality of election laws passed "to alter the predicted viewpoints of" a political party's "standard-bearers." Pet. i. For other than the purposes codified in Utah Code § 20A-9-401, *the record contains no evidence of the Utah Legislature's purpose*. *See* Pet. App. 180a. The Court thus cannot answer the Party's first question on this record. Rather, an order granting certiorari on the Party's first question would lead to an order dismissing the case as improvidently granted.

d. Even if extrarecord evidence (like Count My Vote's website) were relevant, the Party does not tell the whole extrarecord story. As explained, and as the court of appeals recognized, the Legislature passed SB54 to preempt Count My Vote's ballot initiative and preserve a caucus-convention route to the ballot. *See supra* at 4-5; Pet. App. 26a & n.15 (citing sources).

Eliding those non-record facts materially misstates SB54's history. SB54 is not a product of backroom legislative animus toward party conventions or the candidates they produce (who include, of course, the legislators who passed SB54). *See* Pet. App. 180a. Nothing could be further from the truth. So if the Legislature's purpose matters, credit the Legislature with trying to *preserve* the caucus and convention. And legislative intent *favoring* the Party's preferred nomination process hardly justifies plenary error-correction review.

e. The Utah Legislature's actions preserving the caucus-convention system expose the Party's fifth error. The Party casts the caucus-convention system as merely "a *purported* option alongside Count My Vote's reforms." Pet. 6 (emphasis added). Not so. It is an *actual* option that Party candidates have *actually used* in each election year since SB54 took effect to get on the general-election ballot.[6]

That fact also establishes the flaw in the Party's claim that the Legislature "incorporated almost the entire language, verbatim, of Count My Vote's ballot initiative." Pet. 6 (internal quotation marks omitted). By the Party's own lights, Count My Vote wanted "to eliminate the caucus-convention system," *id.*, but SB54

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[6] For example, *amicus curiae* Rep. Rob Bishop sought the Party's nomination only by convention in 2016 and 2018, and won the general election both years. *See* https://elections.utah.gov/Media/Default/2016%20Declarations%20of%20Candidacy/U.S.%20House/1%20Rob%20Bishop%20Declaration.pdf (2016 candidate filing seeking nomination by convention only); https://elections.utah.gov/Media/Default/2018%20Election/Declarations%20of%20Candidacy/US%20House%20Candidates/US%20House%201%20-%20Rob%20Bishop.pdf (same for 2018).

preserved that system. To be sure, a candidate no longer can go directly from the convention to the general-election ballot. But it is false to contend that the Party has "los[t]" a system (Pet. 26) its candidates have actually used to access the general-election ballot.

D. The Party's New Rule Will Create Chaos in Elections Nationwide and Conflicts with Settled Precedent.

1. The Party's proposed rule would inject the very "'chaos'" into "'the democratic process[]'" that this Court has long empowered States to avoid. *Burdick*, 504 U.S. at 433 (quoting *Storer*, 415 U.S. at 730).

Abandoning *White*, *Jones*, and *Lopez Torres* for the Party's new rule would imperil primary election laws throughout the country. *See Clingman*, 544 U.S. at 599 (O'Connor, J., concurring in part and concurring in the judgment) (noting that nearly every State prescribes primary elections). If Utah is doing it wrong, *every State is*.[7]

And the Party's new rule would turn State legislatures into party organs obligated to change State election laws whenever a party's "political view" evolved and a party deemed a new nomination process politically "preferable" to existing ones. Pet. 32. On these questions, legislators would answer to non-politically-accountable party leaders instead of their constituents. So much for States "set[ting] their faces against 'party bosses.'" *Lopez Torres*, 552 U.S. at 205.

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[7] *See* Nat'l Conf. of State Legislatures, State Primary Election Systems, http://www.ncsl.org/documents/Elections/Primary_Types_Table_2017.pdf (identifying the type of primary election in place in each of the 50 States).

2. The Party's new rule also would wreak havoc on this Court's precedent. It contradicts not just nearly 50 years of plain statements in *White*, *Jones*, and *Lopez Torres* but also the reasoning supporting them. If the Party is correct, a primary no longer will be "an ideal forum in which to resolve" intraparty "feuds." *Eu*, 489 U.S. at 227. "[C]ontending forces within the party" will no longer be able to "employ the primary campaign and primary election to finally settle their differences." *Storer*, 415 U.S. at 735. And States no longer could "assure that intraparty competition is resolved in a democratic fashion." *Jones*, 530 U.S. at 572.

Nor would *Clingman* and *Timmons* survive. In fact, those cases rejected the very First Amendment arguments that the Party repackages here.

The political parties in *Timmons* and *Clingman* also complained that the First Amendment *requires* the State to allow their preferred nomination method. The Twin Cities Area New Party claimed a First Amendment right to nominate fusion candidates. *Timmons*, 520 U.S. at 353-55. And the Libertarian Party of Oklahoma claimed a First Amendment right to have all registered voters (of any party) vote in its primary. *Clingman*, 544 U.S. at 584-86. Like the Party here, the parties in *Timmons* and *Clingman* each preferred a system "based upon a political view and message." Pet. 23. The New Party viewed fusion candidates as best situated to "'communicate its choice of nominees on the ballot on terms equal to those offered other parties.'" *Timmons*, 520 U.S. at 362. And the Libertarian Party's message was that "all registered Oklahoma voters, without regard to their

party affiliation," should be able to vote in a party's primary. *Clingman*, 544 U.S. at 585.

But *Timmons* and *Clingman* still rejected those arguments. In fact, the parallels between the losing political parties' arguments in *Timmons* and *Clingman* and the Party's arguments here are striking. The Party claims a First Amendment right to nominate solely by convention. Yet if (as *Clingman* held) it is constitutional for a State to prescribe a primary *and limit who votes in it*, it must necessarily be constitutional for a State to prescribe a primary and *let the party decide* who votes in it. And from *Timmons*'s conclusion—that a State may preclude a party's nominations solely by fusion candidacy—it necessarily follows that a State may preclude nominations solely by convention.

Munro also would be called into doubt. There, the Court rejected a challenge to Washington laws changing the minor-party nomination process from convention to primary election. 479 U.S. at 191-92. The Court reasoned in part that the party's challenge "would foreclose any use of the primary election to determine a minor party's qualification for the general ballot." *Id*. at 197. Here, the Party's argument also forecloses use of the primary election—for *any* party. But *Munro*'s holding—that a State can require a minor party to change from nominations by convention to nominations by primary election—strongly implies that a State can implement those same changes for all parties.

E. The Tenth Circuit Correctly Considered How SB54 Affects the Party Itself.

Nor is the Party's second question presented certworthy. It proceeds from the premise that the court of appeals did not "analyz[e] the burden" SB54 places on the Party itself but instead "consider[ed] only the impact on the association's members." Pet. i. That premise is flawed.

1. The Party objects to a part of the opinion (Pet. App. 20a-25a) answering a fundamentally different question than the one the Party now poses. The Party argued in the court of appeals that SB54 "leaves the party vulnerable to being saddled with a nominee with whom it does not agree." Pet. App. 20a (citing Aplt. Br. 40). The court of appeals' answer met that argument on its terms, focusing specifically on that "context, in which *the question is whether the party is being forced to associate with individuals with whom it may not agree*." Pet. App. 20a n.8 (emphasis added).

Because the district court had previously invalidated SB54's Unaffiliated Voter Provision, the court correctly answered that question "no." It recognized that every Republican Party general-election candidate would now "enjoy the support of at least a plurality of the [Party's] voting members." *Id.* at 21a-22a. In other words, it does not severely burden the Republican Party's association rights when only Republicans participate in selecting a Republican nominee for the general election.

This reasoning cannot be read as the Party now does—to suggest that the Tenth Circuit considers "the Party's *own* views" to be "irrelevant to whether the

Party has suffered a First Amendment burden." Pet. 28. Of course "the party itself has First Amendment rights, apart from those of its members." *Id.* at 29. The court of appeals *expressly stated* as much: "The [Party], like all political parties, has 'a right to identify the people who constitute the association, and to select a standard bearer who best represents the *party*'s ideologies and preferences.'" Pet. App. 21a (quoting *Eu*, 489 U.S. at 224). And "party leaders and convention delegates are still free to communicate to the rest of their party which of the candidates on the primary ballot the leadership supports." *Id.* at 22a-23a.

That is also why the court of appeals' opinion does not implicate *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). *See* Pet. 30. The court never disputed—rather, it *expressly acknowledged*—that the Party and its leaders can (and do) "take[] . . . official position[s]" apart from its members' positions. 530 U.S. at 655; *see* Pet. App. 22a-23a.

2. Finally, the Party contends that the opinion below "endanger[s] all expressive associations," including "the Boy Scouts, the Sierra Club," Pet. 34, and "even . . . churches and other religious organizations," *id.* at 35. That's an about-face from the Party's Tenth Circuit rehearing petition, where it recognized that "[t]he majority apparently agrees that Utah's legislature could not do to the Sierra Club or Catholic Church what it has done to the Party." Pet. for Reh'g or Reh'g *En Banc* at 9, *Utah Republican Party v. Cox*, No. 16-4091 (10th Cir. Apr. 18, 2018) (citing Pet. App. 16a n.6). In any case, this new argument also misreads the opinion.

The court of appeals emphasized that under this Court's cases, "the state's ability to regulate" an association like "a parish or a club" is "not the same" as the state's ability to regulate "a political association whose activities run the gamut from purely internal" to "a hybrid internal-external." Pet. App. 16a n.6-17a n.6. Distinguishing between those types of associations (and the resulting differences in permissible regulation) is "[t]he entire point of [this] Court's jurisprudence in this area." *Id.* at 17a n.6. The court of appeals hewed scrupulously to that point: "The state has no interest . . . in the process by which [a church's] priest is chosen." *Id.* at 16a n.6.

III. VEHICLE PROBLEMS MAKE THIS CASE A POOR CANDIDATE FOR PLENARY REVIEW.

This is a poor vehicle for reconsidering almost a half century of unbroken precedent that has produced no splits and overwhelming State reliance interests.

First, this Court "deal[s] with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937). As discussed, the Court could not reach the Party's first question presented without assuming that facts not in the record contradict the district court's express findings. *See* Pet. App. 180a; *supra* at 22-28.

Second, out of an abundance of caution, Respondent notes a potential recusal issue that this case's multi-tendrilled procedural history might otherwise obscure. Justice Gorsuch was a member of the Tenth Circuit when that court docketed this case and a related one in early 2016. *See Utah Republican Party v. Herbert*, No.

16-4058 (10th Cir.). The Tenth Circuit denied the Party's petition for rehearing *en banc* in the related case while Justice Gorsuch was still a member of that court. *See* Order Denying Pet. for Reh'g or Reh'g *En Banc*, *Utah Republican Party v. Herbert*, No. 16-4058 (10th Cir. Mar. 3, 2017). Justice Gorsuch has previously recused himself from cases in which the Tenth Circuit considered an *en banc* petition while he served there. *See, e.g.*, *Wolfe v. Bryant*, No. 16-5150 (cert. denied Oct. 2, 2017). It is unclear whether considering an *en banc* petition in a related case would raise a similar recusal question.

If so, that also counsels in favor of denying the petition. No pressing need exists for the Court to reconsider nearly five decades of splitless precedent without a full complement of Justices. Laws like SB54 are ubiquitous. If those laws create the kind of severe burdens the Party describes, another case presenting this question—and in which every Member of the Court can participate—surely will soon follow.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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