No. 18-450

In the Supreme Court of the United States

UTAH REPUBLICAN PARTY, PETITIONER,

v.

SPENCER J. COX, ET AL.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Other than Chief Judge Tymkovich's analysis, there is perhaps no better indication that this case merits review than respondents' own strategy here: Respondents do not squarely dispute that the questions as presented in the petition merit review. Instead, respondents attempt to dodge review through such maneuvers as an attempted reframing of the questions, a meritless attack on Judge Tymkovich's analysis of the summary judgment evidence, and a frivolous suggestion that Justice Gorsuch faces a "potential recusal issue." Cox. Opp.34.

I. As Judge Tymkovich recognized, Question 1 is fairly presented and warrants review.

As Judge Tymkovich and the petition explained, the first question merits review, not only because of its effects on the Party and Utah voters (Pet.25-27)—which respondents don't dispute—but also because the panel decision conflicts with the reasoning of *Jones* on a question that is crucial to every political party: whether a government may effectively regulate the decision-making of a private expressive association *for the purpose of altering the views* of its standard-bearers.

1. Tellingly, respondent Cox waits until page 22 of his Opposition before even acknowledging the Party's core First Amendment claim—that SB54 was adopted, not to secure order or fairness in primary elections, but for the viewpoint-based purpose of "encourag[ing] more 'moderate' views among the Party's nominees." Pet.16. Cox begins instead by attacking Judge Tymkovich's exhortation (Pet.99a-100a) that this Court reconsider dicta in *Lopez-Torres* that, in his

view, suggests an almost limitless "scope of government regulation of political party primaries."

First, Cox argues (at 10-12) that, because there is no circuit split, Question 1 should be allowed to "percolate" in the lower courts. But that ignores the undisputed impact of the decision below on the Party and hundreds of thousands of Utah Republicans—who have now lost the ability to select their candidates in the manner prescribed in the Party's bylaws. "Percolation" makes no sense in a case that so fundamentally affects the political system—and the political outcomes—in an entire state.

Second, attempting to escape the petition's showing that a circuit split is generally unnecessary in cases involving the autonomy of political parties, Cox suggests (at 11-12) that *Clingman* and *Grange* were worthy of review only because the lower courts had invalidated state laws. But that ignores *Jones*, in which the lower courts had upheld the challenged law. Pet.27 & n.12.

Third, Cox claims (at 13-14) that Judge Tymkovich and the Party are asking this Court to "overrule precedent" in violation of *stare decisis*. But that ignores the acknowledgment of the panel *majority* that its decision was based on "considered dicta" of this Court, not a holding. And it ignores the admission of Cox's counsel below that his whole argument was based on dicta. Oral Argument at 29:00-30:00 ("I think it is fair to call it dicta[.]"). Dicta, no matter how "well considered," is not subject to *stare decisis* and, indeed, cannot be "overruled," although it can be repudiated or narrowed. That is all Judge Tymkovich and the Party ask this Court to do.

2. Cox further claims (at 15-20) that this Court's decisions already establish "clear, workable rules" governing primary elections, and that the decision below falls well within them. But neither respondent cites any decision of this Court suggesting, much less holding, that a state can regulate or impose conditions on political parties' primary elections for the *purpose* of changing the views of the party's nominees. That is the first question presented here. And, other than dicta, respondents offer no precedent from this Court supporting the panel majority or refuting Judge Tymkovich's analysis.

Cox also claims (at 19) that SB54 does not "'*regulate* the party's internal process' like the California laws *Eu* struck down." The Democratic Party similarly claims (at 20) that the real solution is for the Party to exclude more members on its own. But these points ignore Judge Tymkovich's correct conclusion (Pet.76a-78a) that SB54 imposes an unconstitutional *condition* on the party's ability to have its chosen nominees appear on the ballot—the requirement that the Party submit to a viewpoint-driven rule requiring it to allow candidates selected under the Party's own procedures to be challenged for the nomination by those who refuse to be bound by them.

3. Cox also claims Judge Tymkovich and the petition "misread" *Jones* and other precedent in seeking a general "right" for a party "to exclude both non-party-members *and its own members* from a State-prescribed nomination process." Opp. 21 (emphasis in original). But neither Judge Tymkovich nor the Party asserts such a right. What they are asking for—and what this Court's decisions require—is the right to be free from regulations or conditions adopted for the viewpoint-based purpose of modifying

the views of the candidates a political party ultimately selects and, hence, the party's message.

This also answers respondents' parade-of-horribles arguments about the impact of what Cox repeatedly calls (at 29-30) "the Party's proposed" or "new rule." Nothing in the petition suggests the Party is seeking a ruling that political parties are always entitled to "their preferred nomination method" (Cox 30), or even an absolute "right to nominate solely by convention" (*id.* 31). Instead, following Judge Tymkovich's lead, the rule the Party seeks is simply that governments, whatever their general authority over primary elections, cannot regulate or impose conditions on party candidate selection systems in a manner designed to affect the viewpoints or messages of the candidates the party selects. *E.g.,* Pet.i, 15, 18, 20, 21; Pet.68a, 70a. There is no chance such a modest rule—compelled as it is by the First Amendment—would produce the harms respondents fear.

4. When Cox (at 22), finally joins issue with Judge Tymkovich and the petition, he does not contest their core point that a regulation or condition enacted for the purpose of altering the predicted viewpoints of a party's standard-bearers violates the First Amendment. Instead, Cox argues that this case doesn't really present *that* issue because Judge Tymkovich (and the petition) didn't offer enough evidence to overcome the "finding" by the district court and the majority below that SB54 was not, after all, adopted for the purpose of moderating the Party's supposedly "'extreme' viewpoints." Opp. 22, 34 (citing Pet.180a). The Democratic Party does similarly by citing (at 6-7) a different case raising different issues.

Respondents, however, ignore that this appeal arises from an order granting *summary judgment* to Cox, not from "findings" that might result from a trial. *E.g.* Pet.9a, 101a. Nowhere in their analysis of the evidence do respondents even acknowledge this crucial fact. And no wonder: On appeal from such an order, the evidence must be analyzed in the light most favorable to the *losing* party,[1] and may include not only evidence in the summary judgment record, but facts subject to judicial notice.[2]

The petition itself acknowledges (at 11, 15 n.4) that some of the facts on which it and Judge Tymkovich rely were not included in the district court's summary judgment record. And respondents—who have a non-waivable obligation to point out any technical defects at this stage (see Rule 15.2)—do not dispute the petition's point that those facts are properly subject to judicial notice. If this Court grants review, that conclusion, at least in this Court, will therefore be binding.

Equally telling, neither respondent disputes that the evidence on which Judge Tymkovich and the petition relies adequately establish the Legislature's viewpoint-related purpose *when read in the light most favorable to the Party*—as it must be in an appeal from an adverse summary judgment. See *supra* note 1. By failing to dispute this point in their Oppositions, respondents have waived this argument too. *Id.*

A similar analysis forecloses Cox's argument (at 23) that Judge Tymkovich (and petitioners) incorrectly

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[1] *E.g. Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986); *Wilkie* v. *Robbins*, 551 U.S. 537, 543 n.2 (2007).

[2] See, *e.g.*, Fed. R. Evid. 201; *Rowe* v. *Gibson*, 798 F.3d 622, 638 (7th Cir. 2015).

attributed to the Legislature the views of Count My Vote—the group that, Cox concedes, "brought SB54's reforms to the fore." It is settled that a proponent's views about the purpose of legislation *can* properly be attributed to the legislature, if a finder of fact concludes that this is a fair reading of the evidence.[3] And, as the petition notes (at 14) and the Oppositions ignore, *Jones* itself relied on the views of the proponents of the initiative there.

Accordingly, even if a finder of fact might *ultimately* agree with respondents that Count My Vote's views cannot fairly be attributed to the Legislature, that organization's clearly expressed views are sufficient to defeat summary judgment, as Judge Tymkovich concluded. Neither respondent disputes this conclusion, which must therefore be taken as established for purposes of this proceeding. See Rule 15.2.[4]

Nor is there any merit to Cox's remarkable claim (at 24) that a viewpoint-based purpose must be discerned, if at all, "in the language and structure of the statute itself," not in statements by proponents or legislative sponsors. The Democratic Party's opposition is even more remarkable, citing (at 5-6) statements about legislative history in general, as if they foreclosed relying on legislative history to detect viewpoint discrimination. Both conclusions are

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[3] E.g. *Exxon Mobil Corp.* v. *Allapattah Servs.*, 545 U.S. 546, 570 (2005); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961).

[4] A finder of fact could also conclude that Count My Vote's views today track those it expressed when advocating for SB54. Accordingly, under the "light most favorable" rule, statements from the organization's *current* website can properly be used to defeat summary judgment—as Judge Tymkovich concluded.

foreclosed by a host of decisions holding that, for First Amendment purposes, a viewpoint-based purpose can be established by exactly those types of evidence. *E.g., Jones*, 530 U.S. at 570; *Masterpiece Cakeshop* v. *Colo. Civil Rights Comm'n,* 138 S.Ct. 1719, 1729 (2018); *Nat'l Inst. of Family & Life Advocates* v. *Becerra*, 138 S.Ct. 2361, 2379 (2018) (Kennedy, J., joined by Roberts, C.J., Alito, J., and Gorsuch, J., concurring).

In short, respondents' claim that, other than the purposes stated in SB54, "the record contains no evidence of the Utah Legislature's purpose" (Cox 27; emphasis omitted) is contradicted by a wealth of evidence, properly relied upon by Judge Tymkovich, that the Legislature acted with an improper, viewpoint-based purpose. And respondents' failure to challenge the grounds justifying Judge Tymkovich's (and the petition's) reliance on that evidence ensures the Court will be able to reach and resolve Question 1.

II. As Judge Tymkovich recognized, Question 2 merits review.

Respondents likewise do not dispute that the second question presented—whether a governmental burden on First Amendment rights should be measured by the impact on an association's members rather than the association itself, as defined by its own organizational structure (Pet.i)—was one of the "issues" that Judge Tymkovich said "deserve the Supreme Court's attention." Pet.99a. Instead, Respondents try to dodge the issue.

1. Cox begins by claiming that, in reality, "the Party objects to a part of the opinion" that addressed a "different question," that is, "whether the party is being forced to associate with individuals with whom it may not agree." Cox 32 (quoting Pet.20a n.8). In fact, the petition (at 28-31) squarely challenges the *next* portion of the majority opinion, beginning with the holding that, for First Amendment burden purposes, "the party … *consists of the roughly 600,000 registered Republicans in Utah*" (Pet.22a, emphasis added), not the decision-making organization constituted by the Party's by-laws. Respondents do not dispute that it was on the basis of this recharacterization of the Party and its institutional interests that the majority was able to hold that "the associational rights *of the party* are not severely burdened" by SB54. Pet.23a (emphasis in original).[5]

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[5] Respondents do not dispute the Party's showing (Pet.10-11) that the panel incorrectly treated "party leadership" as synonymous with the Party's bylaws or that, under its caucus system, decisions are made, not by "leadership" (Pet.21a), but by elected neighborhood delegates. Mike Lee 15-25; Utah Legislators 9-18. Nor do respondents dispute the petition's showing (at 29-30) that

Question 2 thus draws into question *not merely* the outcome of the majority's analysis (as Cox claims) but the analytical *framework* by which the majority determined whether and to what extent the Party is burdened by SB54. Judge Tymkovich recognized this point by observing (Pet.73a) that "[a] political party is more than the sum of its members," and hence that to burden the operation of the Party's bylaws is to burden the Party. See also Private Citizen 6-8; Political Parties 10-13.

2. Nor have respondents refuted the petition's showing (at 30-31) that the panel decision conflicts in principle with *Dale*. Cox attempts (at 30) to distinguish *Dale* by limiting its holding to an organization's right to "take [an] official position" on issues distinct from those of the organization's members, which Cox says SB54 allows the Party to do. But again, the reason *Dale* is relevant to Question 2 is the analytical framework the Court used to determine the extent of the First Amendment burden on an expressive organization: The Court assessed the burden on the Scouts by looking, not to the interests of rank-and-file members, but to the organization's interests as determined by those authorized to do so by its bylaws. But here the majority determined the nature and extent of the burden by speculating about the views of Utah's "roughly 600,000 registered Republicans," not by looking to the Party's interests as determined by those authorized by its bylaws to select candidates and set Party policy. The decision below thus conflicts with *Dale*.

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the panel decision conflicts with four Justices' explanation in *Gill* that "[burdens] for party members may be doubly [so] for party officials and triply [so] for the party itself …" 138 S.Ct at 1938.

3. Cox attempts (at 33) to minimize the impact of Question 2 on other expressive associations by contending that the Party conceded on rehearing that under the panel decision "the Utah Legislature could not do to the Sierra Club or Catholic Church what it has done to the Party." But the portion of the rehearing petition Cox cites addressed Question 1—i.e., a government's ability to regulate for the *purpose* of changing an organization's message—not Question 2, which addresses the analytical framework for determining the existence and extent of the burden. See Pet. for Reh'g or Reh'g *En Banc* at 9 (Apr. 18, 2018). As to that question, the Party made the same point (at 23-25) as in the petition, that is, that "[t]he majority's analysis has adverse implications for the regulation of all expressive associations, including churches, universities, labor unions and civic groups."

Cox further claims (at 34) that the majority below adequately limited the reach of its holding on Question 2 by asserting that, in contrast to decisions by political parties, "[t]he state has no interest … in the process by which a priest is chosen." See also Democratic Party 13-14 (similar). But a government *can* often have legitimate interests in decisions made by religious and other expressive organizations.[6] And in those circumstances, the Tenth Circuit's framework for determining the extent of the resulting First Amendment burden endangers expressive organizations of all stripes. See Pet.33-36; U.S. Pastor Council 3-7; Pacific Legal Foundation 11-22; Judicial Watch 11-15.

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[6] See, *e.g., Christian Legal Society* v. *Martinez,* 561 U.S. 661 (2010); *Vision Church* v. *Vill. of Long Grove*, 468 F.3d 975 (7th Cir. 2006).

III. Cox's suggestion that Justice Gorsuch might be recused is frivolous.

Finally, Cox attempts (at 34-35) to manufacture a vehicle problem, claiming that because Justice Gorsuch voted to deny rehearing in a different and unrelated appeal, he may be recused here. In support, Cox cites situations in which then-Judge Gorsuch voted to deny *en banc* review in the *same* appeal and then, as Justice, recused at the certiorari stage.

But this recusal choice appears to rest on the Code of Conduct for United States Judges, which forbids lower court judges from participating in a proceeding in which they previously "participated as a judge (in a previous judicial position)." Canon 3(c)(1)(E). And it is little wonder Cox doesn't cite this provision, because it shows his theory is frivolous. This case began in 2016, under docket number 2:16-cv-0038. The case that generated the earlier appeal—which raised only an attorneys' fee issue and not the validity of SB54—began in 2014 as number 2:14-cv-00876. See *Utah Republican Party* v. *Herbert*, No. 16-4058 (10th Cir.). As the Democratic Party's opposition explains (at 7) the cases concerned significantly different factual and legal issues.

This procedural history clarifies that Cox's recusal theory is not, as he claims (at 35), an "unclear" question. It is frivolous: There is no precedent for any Justice recusing in a *subsequent* proceeding that concerns overlapping factual backgrounds or parties merely because he previously participated in a *different* proceeding raising different legal issues.

To the contrary: Justice Scalia, for example, recused in one case because of his comments about *that*

case, but did not recuse in later cases brought by that same party raising similar issues. Cf. *Elk Grove* v. *Newdow*, No. 02-1624 (Scalia, J., recused) *with*, *e.g.*, *Newdow* v. *Lefevre*, No. 10-893. Cox does not cite any examples in which a Justice recused in subsequent cases based on the Justice's involvement in a previous case, and the Party is aware of none.

Indeed, Cox's suggestion that recusal is a "potential issue" here runs counter to the Chief Justice's observation that, because no Justice can be replaced by another judge to preserve a full panel, "each Justice has an obligation to the Court to be *sure* of the need to recuse before deciding to withdraw from a case." 2011 Year-End Report on the Federal Judiciary, at 9. No Justice could reach such a conclusion on these facts.

CONCLUSION

On close inspection, respondents' arguments only reinforce the conclusion that Questions 1 and 2 merit this Court's review and that this case is a good vehicle. The petition should be granted.

Respectfully submitted,

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