

No. 18-450

IN THE
Supreme Court of the United States

UTAH REPUBLICAN PARTY,
Petitioner,
v.

SPENCER J. COX, ET AL.,
Respondents.

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

**BRIEF OF SEN. MIKE LEE, SEN. TED CRUZ,
REP. RAÚL LABRADOR, AND
REP. ROB BISHOP AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. American Political Parties Have Traditionally Functioned as Associations of Activists Who Seek to Direct Government Power Toward Their Goals, in Large Part By Controlling the Procedure for Selecting Party Nominees	4
A. Political Activists Who Are the Driving Force Behind Political Parties Focus on Nominating Reliable Candidates to Serve as Their Agents in Government	5
B. Despite the Central Role of the States in the Selection of Presidents, Political Parties Have Traditionally Enjoyed Wide Discretion to Choose Presidential Nominees as They See Fit	7
1. The Congressional Caucus System .	8
2. The State-Based Caucus-Convention System	9

C.	State Regulation of the Nominee-Selection Process for Congressional and State Offices Has Traditionally Been Instituted at the Behest of the Major Parties — Not Imposed Over Their Opposition . . .	11
II.	The Caucus System, Chosen by a Political Party as Its Preferred Method of Nomination, is a Valuable Alternative	15
A.	Scholarship Shows That Voters Use Parties’ “Brands” as Informational Cues	16
B.	Caucuses Generate More Clarity About the Parties Because Caucus Goers Tend to Reflect a Party’s Values Best . .	19
C.	Caucuses Offer Unique and Valuable Benefits to a Party and to Civil Society	23
	CONCLUSION	26

TABLE OF AUTHORITIES

<i>Books:</i>	<i>Page:</i>
John H. Aldrich, <i>Why Parties?: A Second Look</i> (2011)	5, 9, 15, 17
Marty Cohen, et al., <i>The Party Decides: Presidential Nominations Before and After Reform</i> (2008)	5-6, 9-11
Gary W. Cox & Mathew D. McCubbins, <i>Setting the Agenda: Responsible Party Government in the U.S. House of Representatives</i> (2005)	17
Morris P. Fiorina, <i>Congress: Keystone of the Washington Establishment</i> (2d ed. 1989) . .	25
Jeffrey D. Grynviski, <i>Partisan Bonds: Political Reputations and Legislative Accountability</i> (2013)	17
Richard Hofstadter, <i>The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840</i> (1969)	8
Seth E. Masket, <i>The Inevitable Party: Why Attempts to Kill the Party System Fail and How They Weaken Democracy</i> (2016) . .	6
Richard P. McCormick, <i>The Presidential Game: The Origins of American Presidential Politics</i> (1982)	6, 9-10

<i>Books (continued):</i>	<i>Page:</i>
Sidney Milkis, <i>Political Parties and Constitutional Government: Remaking American Democracy</i> (1999) . . .	16
Austin Ranney, <i>Curing the Mischiefs of Faction: Party Reform in America</i> (1975)	8-9, 11
Austin Ranney, <i>The Doctrine of Responsible Party Government: Its Origins and Present State</i> (1962)	16
John E. Reynolds, <i>The Demise of the American Convention System, 1880-1911</i> (2006) 11-12, 14	
Frances McCall Rosenbluth & Ian Shapiro, <i>Responsible Parties: Saving Democracy From Itself</i> (2018)	8
Elmer Eric Schattschneider, <i>Party Government</i> (1942)	6, 22
Alan Ware, <i>The American Direct Primary: Party Institutionalization and Transformation in the North</i> (2002) .	10, 12-14
 <i>Articles:</i>	
Stephen Ansolabehere, et al., <i>Old Voters, New Voters, and the Personal Vote: Using Redistricting to Measure the Incumbency Advantage</i> , 44 Am. J. Pol. Sci. 17 (2000) . . .	25

<i>Articles (continued):</i>	<i>Page:</i>
Kathleen Bawn, et al., <i>A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics</i> , 10 <i>Persp. Pol.</i> 571 (2012)	5
Daniel M. Butler & Eleanor Neff Powell, <i>Understanding the Party Brand: Experimental Evidence on the Role of Valence</i> , 76 <i>J. Pol.</i> 492 (2014)	18
Brandice Canes-Wrone, et al., <i>Judicial Independence and Retention Elections</i> 28 <i>J.L. Econ. & Org.</i> 211 (2012)	19
Andrew B. Hall, <i>What Happens When Extremists Win Primaries?</i> , 109 <i>Am. Pol. Sci. Rev.</i> 18 (2015)	22
Melinda Gann Hall & Chris Bonneau, <i>Mobilizing Interests: The Effects of Money on Citizen Participation in State Supreme Court Elections</i> , 52 <i>Am. J. Pol. Sci.</i> 457 (2008)	19
Eitan Hersh, <i>Primary Voters Versus Caucus Goers and the Peripheral Motivations of Political Participation</i> , 34 <i>Pol. Behav.</i> 689 (2012)	23
Christopher F. Karpowitz & Jeremy C. Pope, <i>Who Caucuses? An Experimental Approach to Institutional Design and Electoral Participation</i> , 45 <i>Brit. J. Pol. Sci.</i> 329 (2013)	20, 23-24

<i>Articles (continued):</i>	<i>Page:</i>
James I. Lingle, et al., <i>Divisive Nominating Mechanisms and Democratic Party Electoral Prospects</i> , 57 J. Pol. 370 (1995) . . .	21
Thomas R. Marshall, <i>Turnout and Representation: Caucuses Versus Primaries</i> , 22 Am. J. Pol. Sci. 169 (1978) . . .	24
Costas Panagopoulos, <i>Are Caucuses Bad for Democracy?</i> , 125 Pol. Sci. Q. 425 (2010) . . .	21
David Redlawsk, et al., <i>Comparing Caucus and Registered Voter Support for the 2008 Presidential Candidates in Iowa</i> , 41 Pol. Sci. & Pol. 129 (2008)	20
Peverill Squire, <i>The Iowa Caucuses, 1972-2008: A Eulogy</i> , 5 The Forum 1 (2008)	24
Walter J. Stone & Alan I. Abramowitz, <i>Winning May Not Be Everything, But It's More than We Thought: Presidential Party Activists in 1980</i> , 77 Am. Pol. Sci. Rev. 945 (1983)	22
 <i>Other Authorities:</i>	
David Broder, <i>Wait for New Hampshire</i> , Wash. Post, Jan. 3, 2008	21
Letter from Thomas Jefferson to William Branch Giles (Dec. 31, 1795) (http://founders.archives.gov/documents/Jefferson/01-28-02-0440) . . .	16

INTEREST OF *AMICI CURIAE*¹

Amici curiae are members of the United States Congress. *Amici* participate actively, at both the national and state levels, in the affairs of their political party. They thus have a strong interest in defending the ability of political parties to carry out, with broad autonomy, a core party function: vetting and nominating for office the candidates best able to loyally represent the party's agenda and win a general election.

Amici file this brief to emphasize the need for this Court to grant review and reverse the Tenth Circuit's decision, which disregards the long tradition in America of party autonomy regarding nomination processes and the value of the particular nomination process overridden by the Utah statute at issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Tenth Circuit's opinion wrongly holds that a "political party" may be defined as expansively as possible for First Amendment associational-rights purposes. In the court's view, the roughly 600,000 Utah citizens registered to vote in the Republican primaries all count as "members" of the party who deserve an equally strong role in selecting its

¹ Rule 37 statement: No party's counsel authored any part of this brief, and no person other than *amici* and their counsel funded its preparation and submission. All parties were timely notified of the intent to file this brief, and all parties granted consent.

nominees, no matter how peripheral their involvement in party affairs. Pet. App. 20a-22a. It therefore upheld a statute forcing the Republican Party of Utah to include on its primary ballot candidates who call themselves Republicans (and who gather a minimum number of signatures) — regardless of whether those candidates are, in fact, Republicans. This, the Tenth Circuit held, works no violation of the party’s associational rights.

We disagree. The Utah statute strips core Party activists of their ability to select nominees who are loyal to the Party platform. Pet. App. 20a, 30a. It is a transparent effort by the state to control the types of candidates selected by the Party. Pet. App. 54a-55a, 66a. When the state manipulates the nomination process to stack the deck in favor of some types of candidates it both undermines parties’ associational rights and denies voters a genuine electoral choice. The Party’s caucus-convention system, followed for decades as required by its constitution, is a perfectly appropriate nomination method. Pet. App. 52a-54a.

The Tenth Circuit’s breathtakingly broad definition of party “members” finds little support in the history of parties in America and in the political science literature.

Part I of this brief shows that, contrary to the Tenth Circuit’s core premise, historically political parties in America have functioned not as mass-membership organizations, but as relatively small, often informal, associations of activists who band together to advance policy and philosophical goals. Part I-A demonstrates that parties are comprised of

interest groups and activists whose aim is to identify and nominate candidates who share their policy preferences, who can win a general election and who, if placed in government offices, will serve as loyal agents carrying out the activists' objectives.

Parts I-B and I-C summarize the wide latitude parties have always enjoyed over the process for nominating their candidates. Part I-B shows that, despite the central role of the States in the selection of presidents, parties traditionally have enjoyed wide discretion to choose their presidential nominees, unhindered by state regulation — initially under the congressional caucus system, and later under the state-based caucus-convention system.

Part I-C shows that parties have also enjoyed wide latitude over the process for nominating candidates for congressional and state offices. Although the States started regulating some aspects beginning in the 1890s, such regulation traditionally has been done at the behest of the major parties, for their benefit — not imposed over their opposition, as was done with the Utah statute at issue.

Whereas Part I of this brief focuses on history and tradition, Part II examines recent empirical studies of voting, parties, and the caucus system. Part II-A reveals that party leaders and party activists have well-founded reasons to believe that a caucus-convention system better advances their goals. A party's ability to win in the general election depends, in part, on the strength of its "brand." Part II-B shows that a caucus-convention system both strengthens a party's brand and ensures party nominees are loyal to the party's agenda. Part II-C shows

that a caucus-convention system also generates other socially positive benefits, such as fostering a spirit of community.

A grant of certiorari is warranted to preserve these benefits of the caucus-convention system where chosen by party activists, both in Utah and elsewhere, and also more generally to safeguard the associational rights historically enjoyed by political parties.

ARGUMENT

I. American Political Parties Have Traditionally Functioned as Associations of Activists Who Seek to Direct Government Power Toward Their Goals, in Large Part By Controlling the Procedure for Selecting Party Nominees

At the core of the Tenth Circuit's decision is its premise that the Republican "Party" of Utah is appropriately defined, for associational-rights purposes, as comprising the roughly 600,000 Utah citizens who have registered to vote in the Republican primaries, no matter how peripheral their involvement in Party matters. Pet. App. 20a-22a. All such potential voters, the court reasoned, have an equally strong interest in selecting the Party's nominees.

That premise is inconsistent with American political history, which shows that parties have always been run as associations of a relative handful of policy-oriented activists who exercise close control over the process for selecting party nominees.

A. Political Activists Who Are the Driving Force Behind Political Parties Focus on Nominating Reliable Candidates to Serve as Their Agents in Government

“Parties are a central political institution — arguably *the* central institution — for organizing society’s diverse demands and interests.” Marty Cohen, et al., *The Party Decides: Presidential Nominations Before and After Reform* 30 (2008). At the center of the formation and operation of parties have been “interest groups, social group leaders, activists, and other ‘policy demanders’ working to gain control of government on behalf of their own goals.” *Id.* at 6. Their objective in participating in partisan politics is to influence government policy. Fundamentally, all “parties are the creatures of interest groups, ideological activists, and . . . intense policy demanders” who “organize parties to get the government policies they want.” *Id.* at 20. *See also id.* at 31-36; John H. Aldrich, *Why Parties?: A Second Look* 188 (2011); Kathleen Bawn, et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 *Persp. Pol.* 571 (2012). From this perspective, voters who are merely *registered* to vote in a party’s primaries are not actually a *part* of the party (viewed as an association or organization), “even if they identify strongly with a party and consistently support its candidates.” Aldrich at 18.²

² Throughout this brief we refer to the people and groups who function as the party “core.” By this we mean those who do more than simply vote in party primaries. They are

Critical here is who controls selection of a party's nominees. "Groups of policy demanders focus on nominations because it is easier to achieve their goals by electing politicians who share their views than by winning over truly independent politicians after they have taken office." Cohen at 362; *see also id.* at 32-34. Thus, "[t]he central act of a party coalition" is the nomination of candidates. *Id.* at 38. "In making nominations, the groups that constitute parties" have as their purpose "to place reliable agents in government offices." *Id.* at 31.

"The most essential attribute of an electoral party is some arrangement for securing agreement on a single candidate, or slate of candidates." Richard P. McCormick, *The Presidential Game: The Origins of American Presidential Politics* 187 (1982). *See also* Elmer Eric Schattschneider, *Party Government* 64 (1942) ("[H]e who can make the nominations is the owner of the party"). "Whoever can credibly claim to have determined a nomination, be it a legislative caucus or the attendees at a convention or a shadowy group of business elites, *is* the party for all intents and purposes." Seth E. Masket, *The Inevitable Party: Why Attempts to Kill the Party System Fail and How They Weaken Democracy* 21 (2016). The "party,"

loyal and regular devotees to the party. Those within the party "core" share two traits: (1) they are deeply committed to the party's principles, and (2) they seek to protect the long-term integrity and effectiveness of the party. See pp. 17-22, *infra*. They occupy a myriad of roles: party officer, party government official, other party leader, campaign volunteer, campaign donor, partisan journalist, citizen journalist, citizen activist, allied group leader, etc.

defined on this essential basis, in the modern era is typically not a creature of machine “bosses,” but instead consists of a large, diverse set of party activists – for example, the Utah Republican Party.³ But whatever structure a particular party may have, maintaining control over the nomination process has always been a central focus of those who work in the core of political parties, as we now show.

B. Despite the Central Role of the States in the Selection of Presidents, Political Parties Have Traditionally Enjoyed Wide Discretion to Choose Presidential Nominees as They See Fit

Throughout the circuitous history of American presidential selection, the parties, not legislative bodies, have controlled the process. Caucus-based systems, not direct voting, historically predominated.

³ The Utah Republican Party is dominated by volunteers who care about the party, not by machine “bosses” operating in smoke-filled rooms. Its caucus system is structured to ensure party loyalty without machine-type corruption. It does so based on the *quantity* of delegates (the Party elects roughly 4,000 state delegates, and tens of thousands of county delegates, every two years), the *diversity* of delegates (they are elected in neighborhood caucuses widely dispersed throughout Utah), and the *regular turnover* of delegates (roughly 75% of delegates are replaced each election cycle). By making it impracticable for a candidate to capture significant delegate support based on corrupting influences, this system forces a candidate to focus on persuading delegates that he or she is the best nominee for a particular office.

The Constitution makes no provision for political parties, which at the time of the framing were regarded as “evil in intent and disastrous in effect . . .” Austin Ranney, *Curing the Mischiefs of Faction: Party Reform in America* 30 (1975). See also Frances McCall Rosenbluth & Ian Shapiro, *Responsible Parties: Saving Democracy From Itself* 119-21 (2018). The Framers “hoped to create not a system of party government under a constitution but rather a constitutional government that would check and control parties.” Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840*, at 53 (1969). Part of the system of separated and divided powers was the Electoral College, designed to ensure that the office of president would be filled based on the independent judgment of electors appointed by the States, selecting from among the most esteemed statesmen, without partisan intrigue. That plan had a short shelf life, as partisan activists quickly focused on nominating and concentrating votes in favor of their preferred candidates, first working within Congress, and later through a state-based caucus-convention system.

1. The Congressional Caucus System

Partisan maneuvering to ensure the selection of presidential electors who would vote for a predetermined slate of candidates existed even in the presidential election of 1789. Alexander Hamilton worked with congressional allies, and against Anti-Federalist forces, to ensure that George Washington would receive an overwhelming vote, and that John

Adams would finish a distant second. McCormick at 32-37. It quickly became evident “that the process of choosing a President could be manipulated,” with partisans agreeing in advance on candidates and vying to select electors “pledged to vote for specific candidates.” *Id.* at 39.

By 1800, competition between the Federalists and the Jeffersonian Republicans was managed by their congressional leaders, who used caucuses to determine who would stand for election. Cohen at 63; Aldrich at 94-97 The congressional caucus system ended in 1824. Ranney at 64-69, 171-174; McCormick at 63-65 70, 88-93, 86-99, 103-06, 116. Through adroit manipulation of the system for nominating candidates in what functioned as essentially a one-party system, Jeffersonian Republicans from Virginia managed to occupy the presidency for six straight terms, from 1801 to 1825. McCormick at 76-116.

2. The State-Based Caucus-Convention System

As the Jeffersonian Republican party began to dissolve amid numerous aspirants for the presidency, in 1824 it became clear that the congressional caucus system could no longer function to produce partisan consensus on a candidate for the presidency, as four major candidates bitterly fought for nomination by supporters in Congress and in various states. *Id.* at 116, 119; Cohen at 65-66. As a result, no candidate received a majority of electoral votes, and John Quincy Adams was elected by the House of Representatives. McCormick at 120.

A coherent new system for achieving partisan consensus on presidential nominees emerged in 1832, with the national party caucus-convention system pioneered by Jacksonian Democrats, a system which persisted through 1968. *Id.* at 136-42, 153-54, 164-66, 229-34. Under this system, “each state party sent delegates to a national party convention shortly before the presidential elections, where they collectively chose a presidential nominee.” Cohen at 93. *See generally* Alan Ware, *The American Direct Primary: Party Institutionalization and Transformation in the North* 57-63 (2002). By 1844, the system evolved into a relatively stable one featuring two major parties (with the Democrats initially competing against the Whigs, and then the Republicans), each using its own state-based convention system. McCormick at 164-66, 172-73, 181-82, 188-97.

For a century thereafter, the delegations in most states were controlled by political “bosses” who consulted and bargained at the national conventions in determining which candidate should receive the party’s nomination. Cohen at 93-95. As late as 1952, in only about 20% of state party organizations did ordinary voters affiliated with parties wield “predominant influence” — so that generally “party insiders were apparently free to select national convention delegates and to make commitments to candidates on the basis of whatever considerations they wished.” *Id.* at 116. *See also id.* at 118 (“the selection of delegates to the party conventions — and hence the choice of party nominee — was dominated by insiders”); Ware at 73 (“The caucus-convention

system advantaged . . . those who were organized and had control of political resources.”). It was not until 1972 that the system became much more open to direct voter input, with the more widespread use of primaries to determine delegate selection. Cohen at 157-70.

Remarkably, throughout this history, even though the Constitution vests in the States the power to elect the president (by specifying the method for selecting electors), parties have been free to use whatever nomination process they wish, with voters’ choice thereby nearly always limited to only two viable options.

C. State Regulation of the Nominee-Selection Process for Congressional and State Offices Has Traditionally Been Instituted at the Behest of the Major Parties — Not Imposed Over Their Opposition

For most of the 1800s, state political parties functioned as entirely private associations. Ranney at 75, 78-79. When state regulations were finally imposed, it typically was not over the objection of major party insiders but at their behest, as a means of solving administrative difficulties they faced, and of reinforcing the major-party duopoly. John E. Reynolds, *The Demise of the American Convention System, 1880-1911*, at 226 (2006) (“Much of the most important legislation bearing on the nomination process moved through the state legislatures with hardly any opposition.”). Major aspects of regulation included prohibitions on vote fraud, party-

registration requirements, ballot reform, and direct primaries.

Vote Fraud and Bribery. As intra-party battles under the caucus-convention system became more heated by the 1880s, party leaders in many states faced the problem of vote fraud (for example, ballot stuffing) and bribery of convention delegates. To shore up the legitimacy of the nomination process, they successfully sought legislation outlawing such tactics, which had already been prohibited in general-election stage, so that there was “little opposition.” Reynolds at 163. *See also id.* at 99-100, 112-14, 167, 173, 179; Ware at 70-73, 205-06.

Party-Registration Requirements. Party leaders also used the state legislative process to address the “vexing problem” of “the participation of nonparty members in their proceedings.” Reynolds at 116. “No state in the 1880s required voters to register their party affiliation,” so in their effort to allow only party supporters to participate in the nomination process, party officials typically “functioned on the honor code.” *Id.* This system broke down “when a highly competitive contest loomed,” creating the risk that enemy partisans would “aid the candidate who would be easiest to beat in the general election,” *id.* at 117 – prompting passage of state legislation requiring voters to register their party affiliation. *Id.* at 209. This facilitated the ability of party activists to control the result. *Id.* It also “coerced independent voters back into party ranks if they hoped to have a voice in the candidate selection process,” thereby benefitting the major parties. *Id.* at 227.

Ballot Reform. Party leaders managing the nomination process faced another serious problem through the 1880s: the absence of any state-authorized official ballots. To keep their voters in line during the general election, party officials had to print their own official “ticket” listing the party’s nominees for each office, which would be handed to the voter, who would then deposit it in the ballot box. *Id.* at 126-27. This process risked undermining the vote for the party’s nominee, given the ability of rejected party candidates to offer competing tickets, or of any general-election candidate (including a third-party candidate) to induce voters to alter the ticket, and avoid voting a “straight” party ticket. *Id.* at 124-29. This problem “induced the major parties to embrace ballot reform,” through state-mandated official ballots, “usually a single ballot to be marked up inside a voting booth.” *Id.* at 130-31. This reform promoting straight ticket voting both “protected the major parties from ‘treachery’ from within” and made it more difficult for third parties and fusion candidacies to obtain a ballot position. *Id.* at 131, 165-66. *See also* Ware at 21-22, 31-56, 77-81, 205. Of course, “any system that facilitated straight ticket voting discouraged independent political action in support of candidates who were not running for a major party.” *Id.* at 43.

Direct Primaries. Finally, beginning in the 1890s party leaders were instrumental in the vast majority of states in securing state legislation providing for the election of party nominees through direct primaries, which party stalwarts at a 1898 national conference opined would be “in the best interests of

both major parties.” Reynolds at 161-62. “Direct nominations would strengthen the Democratic and Republican parties by restoring public confidence in their internal workings.” *Id.* at 197-98. *See also id.* at 203 (“the direct primary emerged victorious . . . primarily because it addressed the major parties’ long-standing efforts to promote harmony and disarm dissident elements.”); *id.* at 230-31 (direct primaries were adopted “with hardly any dissent,” as they increased the clout of urban politicians, disadvantaged third parties, and advantaged incumbents). *See also* Ware at 81-84, 110-26, 150-54, 211-14. Direct primaries aided Democratic party officials in maintaining a monopoly over politics in the Solid South: “By making the Democratic primaries fully into elections,” from which blacks were barred, it became “virtually impossible for black interests to be heard in the electoral arena.” *Id.* at 103.

By the 1920s, reformers who had championed state legislation creating direct primaries began having second thoughts, particularly concerning the “expensive electioneering practices” they involved, and “the mounting evidence that political machines had used the device to further entrench themselves in power.” Reynolds at 227. Efforts to repeal or cut back on the direct primary were launched in many states, but to little avail: “A cohort of politicians had come to power through its mechanisms and they had no incentive to return to the convention system.” *Id.* at 228. *See also* Ware at 228-31.



Utah Statute Under Review. Political parties in Utah, of course, resisted the impulse a century ago to

embrace the direct primary mechanism. See note 3, *supra*. The Republican Party of Utah continues to resist it, preferring another nomination mechanism. Pet. App. 52a-54a. In sharp contrast to the reforms of party-nomination procedures discussed above, which were adopted with the assent, and often active backing, of major party leaders, the Utah statute under review overrode the constitution of the Utah Republican Party over its expressly articulated associational-rights objection. The statute did so even though the caucus-convention system favored by the Party — which provides that, to reach the general election, candidates must appear at the Party’s convention, pledge loyalty to the party platform, and achieve at least 40% support among the delegates — is an entirely reasonable nomination procedure, a point to which we next turn.

II. The Caucus System, Chosen by a Political Party as Its Preferred Method of Nomination, is a Valuable Alternative

Our republic could not function without political parties. John H. Aldrich, *Why Parties?: A Second Look* 3-4, 16-19, 25-35, 56-60 (2011). When it comes to voting, political party affiliation is critical to voters, who infer policy positions from the “R” and “D” labels. They infer that if they vote “R,” they will get one set of outcomes; if they vote “D,” they will get another. When these party labels become diluted, voting suffers.

The caucus system is widely recognized as one of the best ways to enhance and protect the policy choices of a political party and, in turn, protect both

its brand and voters' capacity for meaningful choice. The political science literature shows that caucus goers tend to vote more in line with the party's core than do primary voters. Moreover, there are unique civic values associated with caucuses — values not always obtainable from primaries.

A. Scholarship Shows That Voters Use Parties' "Brands" as Informational Cues

Many political scientists support what is termed, in the literature, "responsible party government." Austin Ranney, *The Doctrine of Responsible Party Government: Its Origins and Present State* 8-22 (1962). The concept dates back at least to the time of Woodrow Wilson. "Wilson believed that political debate and resolution required parties, that a more national programmatic party system . . . was a critical ingredient of" republican government. Sidney Milkis, *Political Parties and Constitutional Government: Remaking American Democracy* 75 (1999). Even Jefferson, who once quipped he would not go to heaven if it required a party to get there, later relented: "[W]here the principle of difference [between the parties] is as substantial and as strongly pronounced as between the republicans and the Monocrats of our country I hold it as honorable to take a firm and decided part, and as immoral to pursue a middle line" Letter from Thomas Jefferson to William Branch Giles (Dec. 31, 1795) (<http://founders.archives.gov/documents/Jefferson/01-28-02-0440>).

This responsible party government framework requires a number of things from parties, chief of

which are clarity and follow through. That is, the parties should:

- Adopt clear policy commitments for voters;
- Implement those policies when they control government;
- When they are out of power, develop alternatives to current government policies; and
- Differ sufficiently between themselves so as to offer voters a real policy choice.

Aldrich at 11-12. Put simply, in order for political parties to perform their most critical functions within our republican form of government, they must have clear brands tied to their policy platforms and legislative track records. They must focus on giving voters a meaningful choice over how to run the government. Jeffrey D. Grynaviski, *Partisan Bonds: Political Reputations and Legislative Accountability* 2-3 (2013).

This approach is not only a normative ideal. It is something that, empirically, modern parties actually work to accomplish — they focus on creating and maintaining strong brands to win elections. Gary W. Cox & Mathew D. McCubbins, *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives* 1-11 (2005). Party members authorize party leaders to act as their trustees in creating legislative results that match party principles, and party leaders are accorded discretion to control the legislative agenda to produce legislation that, in turn, creates a positive brand for the party.

It is important that the brand represent something identifiable. “In elections, voters must be sufficiently informed [about the parties] to create meaningful nonrandom decisions. Party-policy brands serve as heuristic cues about candidates’ ideology.” Daniel M. Butler & Eleanor Neff Powell, *Understanding the Party Brand: Experimental Evidence on the Role of Valence*, 76 J. Pol. 492, 494 (2014) (citations omitted). Voters typically know little about the specific policy positions of individual candidates, but they tend to be familiar with the general positions of the parties on broad issues. If voters know what a “Republican” usually stands for, and if they know that a particular candidate is a Republican, they can infer that candidate’s policy positions. And it turns out, empirically, that voters actually *do* focus on a party’s brand, supporting candidates when the brand is good and opposing them when the brand is bad or has little meaning. *Id.* When a party loses control over its nominees it loses control over its brand, and over the policies its office holders can be expected to support. Its brand becomes muddled, and voters lose important information needed for an informed vote.

Some of the best data available on this point come from nonpartisan judicial elections. Some states select and retain their judges through partisan elections; others rely on nonpartisan elections. The two methods are functionally equivalent save for one difference: voters in the partisan judicial elections see an “R” or a “D” next to the candidates’ names; voters in the nonpartisan elections see only the names. It turns out that voters who lack partisan

cues about judicial candidates are less informed, more beholden to interest groups for informational cues and, as a result, less likely to vote. Brandice Canes-Wrone, et al., *Judicial Independence and Retention Elections* 28 J.L. Econ. & Org. 211, 214-18, 225-26, 228 (2012); Melinda Gann Hall & Chris Bonneau, *Mobilizing Interests: The Effects of Money on Citizen Participation in State Supreme Court Elections*, 52 Am. J. Pol. Sci. 457, 462-63, 466, 468 (2008). Interest groups tend to focus on isolated votes cast by judges in a handful of cases — information which can be unreliable and, at minimum, reflects the narrow agenda of the interest group. Canes-Wrone at 212, 214-17. Bereft of party labels, voters make less informed decisions.

Voters need reliable information about political parties when casting their votes. Strong party brands meet that need and thereby improve the functioning of our electoral system.

B. Caucuses Generate More Clarity About the Parties Because Caucus Goers Tend to Reflect a Party's Values Best

Because voters rely on parties' brands, parties have strong incentives to control the process by which they define their brand. Caucuses can help them achieve brand clarity, with concomitant benefits for our republican form of government. Empirical studies that compare primary voters to caucus voters generally show this: caucus goers more closely reflect party values and policies than do primary voters. Consequently, caucuses create and perpetuate greater brand clarity.

A recent study examined citizens' likelihood of voting in caucuses as compared to primaries. Christopher F. Karpowitz & Jeremy C. Pope, *Who Caucuses? An Experimental Approach to Institutional Design and Electoral Participation*, 45 *Brit. J. Pol. Sci.* 329 (2013). It asked survey respondents about their ideological preferences and their views on certain issues. It found that caucus goers are far more similar to the party's core, and accordingly its values, than are general primary voters — the data “clearly show that the electorate for caucuses is likely to be more ideologically consistent with” the party's core values. *Id.* at 330. Survey respondents holding policy views *consistent* with their party's core were 13 percentage points more likely to attend a caucus than those who did not hold such views. *Id.* at 343, 347-48. By contrast, those holding views less consistent with their party's core, though less willing to show up for a caucus, were just as likely as those identified with the party's core to show up to vote in primaries. *Id.* at 344. These results demonstrate that caucuses are a superior method for ensuring that the party's core has a strong voice in nominee selection. “[T]he choice of institutions is not neutral.” *Id.* at 349. Other scholarship concurs. *See, e.g.*, David Redlawsk, et al., *Comparing Caucus and Registered Voter Support for the 2008 Presidential Candidates in Iowa*, 41 *Pol. Sci. & Pol.* 129, 130-31 (2008).

Another study examined the beliefs of caucus goers and primary voters on issues such as the Iraq war, Social Security, health care, and affirmative action. Costas Panagopoulos, *Are Caucuses Bad for Democracy?*, 125 *Pol. Sci. Q.* 425, 432 (2010). It

demonstrated that caucus goers hold views more in line with their party's core than do primary voters. It also showed that general primary voters are more like the general public than are caucus voters. *Id.* at 435 (“[T]here is greater alignment between the ideological distribution of primary voters and the public than there is between caucus participants and the public.”). *See also id.* at 434-40. Plainly, a party's brand is diluted by any movement away from a caucus-based system for selecting nominees. James I. Lingle, et al., *Divisive Nominating Mechanisms and Democratic Party Electoral Prospects*, 57 *J. Pol.* 370, 375 (1995) (“caucuses give state and local party leaders greater control over delegate selection and greater influence at national conventions”).

Anecdotal reports corroborate these statistics. As one columnist put it, the caucus system “empowers the activists and those with built-in organizational ties who can mobilize people to leave their homes for a couple of hours on a weeknight” David Broder, *Wait for New Hampshire*, *Wash. Post*, Jan. 3, 2008. That party activists — those who seek to enforce the party's policy choices — are benefitted by caucus systems is no surprise. That is much of the *point* behind their decision to become active in party affairs. For a party to be effective, and to serve as a vehicle by which citizens can associate to change their government, a party must *mean* something. A caucus system which helps reinforce a meaningful set of party values advances that objective.

Critics of caucuses argue, mostly based on anecdotes, that caucuses lead to bad outcomes

because they are fueled by extremists who value ideological purity at the expense of electability. Yet studies show that caucus goers are able to put aside ideological blinders and pass over ideologically “purer” candidates in favor of candidates who have a better chance of prevailing in the general election. Walter J. Stone & Alan I. Abramowitz, *Winning May Not Be Everything, But It’s More than We Thought: Presidential Party Activists in 1980*, 77 Am. Pol. Sci. Rev. 945, 949-951 (1983).

What is more, even if caucuses were to be filled with ideologues who value purity at the expense of electability, so what? Parties have the associational right to produce the candidates they desire. They get to choose their brand. Of course, they also have every incentive to avoid extremes, given that a party that consistently offers up extremist candidates will find its long-term prospects severely compromised. “Politics is an extremely competitive enterprise and politicians who try procedures that do not work are put out of business.” Elmer Eric Schattschneider, *Party Government* x-xi (1942). See, e.g., Andrew B. Hall, *What Happens When Extremists Win Primaries?*, 109 Am. Pol. Sci. Rev. 18 (2015). In any event, having clear ideological differences between the parties, thus enhancing “brand” competition, is an essential element of our political system.

Finally, even if it were shown that primary voters and caucus goers are roughly equivalent in terms of their policy preferences, the Utah Republican Party’s caucus system holds other advantages which justify its survival, as we next examine.

C. Caucuses Offer Unique and Valuable Benefits to a Party and to Civil Society

Caucuses offer unique benefits often unavailable in general primaries and other candidate-selection systems. Perhaps most important, caucuses enhance social and community ties. People who vote in primaries walk silently into a booth, check a box, and move on with their day. They interact little, if at all, with their neighbors and others in the community. Caucus goers, by contrast, are more community-minded and more involved in deliberating and voting on candidates. Eitan Hersh, *Primary Voters Versus Caucus Goers and the Peripheral Motivations of Political Participation*, 34 *Pol. Behav.* 689, 706-07 (2012).

Caucus goers necessarily interact with each other. They learn from each other. They respect each other by listening to one another's views. Indeed, it may be "that the social aspect of the caucus is the prime motivator for citizens who do participate." *Id.* at 697. After all, caucuses allow citizens "an opportunity to reinforce their social ties." *Id.* They can visit with each other, catch up on social and personal events, and build stronger personal bonds within their communities. None of this is possible within the isolated, impersonal voting booths used in primaries.

Perhaps not surprisingly, the data show that citizens who participate in caucuses tend to value them highly on process grounds. Karpowitz & Pope at 340 ("Respondents who reported attending the caucuses judged them to be significantly more fair, more open to different points of view, more likely to

result in the best choice, and less prone to bias toward special interests” than respondents who never attended a caucus).

Such enhanced community involvement both reflects and sustains the best of our republic. As one scholar notes:

The Founders were familiar with the idea that voters might in some sense know the candidates from having actually seen them and with the notion that neighbors would gather together and discuss candidates and issues before voting. In contrast, current American voting practices [i.e., primary voting] would probably strike the Founders as odd.

Peverill Squire, *The Iowa Caucuses, 1972-2008: A Eulogy*, 5 *The Forum* 1, 8 (2008).

Caucuses also benefit party organizations (and, in turn, the system of responsible party government) by “identifying potential activists and volunteers, permitting grass-roots issue debate, and allowing face-to-face meetings of party activists.” Thomas R. Marshall, *Turnout and Representation: Caucuses Versus Primaries*, 22 *Am. J. Pol. Sci.* 169, 180 (1978).

Moreover, caucus systems promote a focus on geographical diversity, and a consequent diffusion of political power, which protect citizens who live in thinly populated areas of a state. The Utah Republican Party’s caucus system mandated by its constitution mirrors the liberty-enhancing federalism of our national political system. A statewide candidate must campaign in every corner of the state

to obtain the caucus votes needed to avoid a primary race. Salt Lake City, despite its enormous population base, thus cannot dictate nominations. That focus on geographical diversity is eliminated in a primary system, with its first-past-the-post victory metric.

Finally, caucuses help reduce the incumbency advantage which so often impairs vigorous electoral competition. The incumbency advantage is typically defined as how much of the vote an incumbent receives due solely to the fact that he or she is the incumbent, having represented voters in the past. In large part, the incumbency advantage flows from the work incumbents do for their constituents, such as casework and obtaining targeted benefits for the electorate. Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* 48-51 (2d ed. 1989). The effect is substantial. In congressional races the incumbency advantage has been estimated at between seven and ten points, with at least half attributable to constituent work and district-directed benefits. Stephen Ansolabehere, et al., *Old Voters, New Voters, and the Personal Vote: Using Redistricting to Measure the Incumbency Advantage*, 44 *Am. J. Pol. Sci.* 17, 17-18, 26, 30 (2000).

From a party's perspective, it is problematic that much of this incumbency advantage has nothing to do with what the incumbent does for the party — or the public — in terms of policymaking. If those who form the core of a party are content to allow incumbents to focus on selectively benefitting constituents, and choose to insulate incumbents from electoral competition, direct primaries are an ideal means of doing so. But if a party's core expects incumbents to

adhere to the party's brand, and focus on carrying out its principles for broad public benefit, caucuses provide an effective means of minimizing the incumbency advantage.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted.

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