

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 *AMICI CURIAE* UTAH
LEGISLATORS, CURRENT AND FORMER
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

This brief will address the first question presented in the Petition, as follows:

Does the First Amendment permit a government to compel a political party to use a state-preferred process for selecting a party's standard-bearers for a general election, not to prevent discrimination or unfairness, but to alter the predicted viewpoints of those standard-bearers?

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INTEREST OF *AMICI CURIAE*¹

Amici Curiae are current and former Utah legislators. Some of them voted for the legislation at issue in this case but have since become convinced that it violates the First Amendment. All have serious concerns with the legislature regulating political parties' selection of party nominees. They have experienced and witnessed the attendant harms to candidates and to political party stability—and the corresponding detriment to voters—that result from the expansion of government regulation over political parties beyond what is needed to regulate the pure mechanics of public elections, to ensure the integrity of election outcomes against fraud and corruption, or to counteract discrimination in public election-related processes.

INTRODUCTION

For some time, interests in the business wing of the Party have sought a way for their candidates to utilize the Party's name on the general election ballot without having to deal with the Party's uncontrollable and unpredictable nominating process. SB54—the

¹ *Amici curiae* are listed in full in Appendix A. As required by Rule 37 of the Rules of this Court, *amici curiae* notified counsel of record for all parties of their intention to file this brief at least 10 days before the due date. The parties all have consented to the filing of this brief. *Amici curiae* also represent that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

legislation at issue—embodies those efforts. The Party’s nominating process, a manifestation of its First Amendment right of association, employs representative democracy to limit the need for money—and thus limit the influence of monied special interests. Neighborhood representatives, democratically elected by Party members in public meetings, are delegated responsibility to represent the neighborhood’s Party members in vetting nomination seekers and then subsequently selecting the Party’s nominees at a Party nominating convention. The approach enables—and thus demands—personal interaction between those seeking Party nomination and all of those voting for Party nominees, which empowers average citizens—both as voters and as candidates—and works against nomination seekers who lack substance, who seek to avoid their voting records, or who don’t agree with and won’t work to advance the Party’s principles. SB54, on the other hand demands a different type of electioneering—one that requires more money. Personal interaction between nomination seekers and all primary voters is simply not possible, so mailers and media buys—rather than personal interaction—are what candidates employ and are what primary voters have access to. This preference for selecting nominees by prioritizing direct interaction between candidates and constituents is an archetypal example of an associative right protected by the First Amendment.

The majority’s holding below sanctions imposition of the State’s nominating process in lieu of the time-tested one chosen by the Party and protected by the First Amendment, thus empowering monied special

interests and inviting fraud: qualifying for the State’s primary election, which designates the Party’s nominees under the State’s scheme, is now only a matter of obtaining sufficient signatures—an undertaking open to fraud and easily accomplished with enough money—and the logistics of primary electioneering are likewise a matter of money.

Moreover, the majority’s holding undermines the principle of representative democracy—the approach the Party employs to limit reliance on monied special interests—by calling that practice into question as “overly restrictive and potentially unrepresentative.” Pet. 20a. The holding additionally contradicts the Court’s explanation in *New York State Bd. of Elections v. Lopez Torres* that “[s]election by convention has never been thought unconstitutional, even when the delegates were not selected by primary but by party caucuses.” 552 U.S. 196, 206 (2008).

The issue of whether a government may constitutionally impose on a political party the kind of substantive intrusion that SB54 represents has divided the Party and the state and will not be resolved absent the Court’s examination of the issue, since the governor has promised to veto all SB54 repeal measures. This is the ideal vehicle for the Court to vindicate the First Amendment rights of political parties.

STATEMENT

The Utah Republican Party historically has selected nominees through a caucus-convention system based on representative democracy. Every two

years before elections, Party members gather by neighborhood to elect delegates and elect Party leadership. The delegates are to vet candidates on behalf of the neighborhood and then, at a subsequent convention, either select Party nominees outright or narrow the field of contenders to two.

A group known as Count My Vote sought to change nomination outcomes through a 2014 ballot initiative that replaced the Party's nominee selection system with a direct primary election, for which any contender could qualify by obtaining signatures. To forestall the initiative, the Utah Legislature agreed with Count My Vote, over the Party's objection, to incorporate the initiative language almost verbatim into legislation that also allowed the Party to run the nominees that the Party chose in convention in the State's primary, the top vote getter being named by the State as the Party's nominee. Count My Vote halted its initiative, and the legislature enacted SB54.

The Party challenged SB54 on First Amendment grounds; the district court held SB54 did not severely burden the Party's rights and granted summary judgement for the State. A divided Tenth Circuit panel affirmed on appeal, defining the Party's First Amendment right of association to exclude the Party's ability to select the process it uses to choose its nominees and suggesting that the Party viewpoint is the popularly-expressed viewpoint of individuals who at any given time have marked "Republican" as their affiliation on their voter registration. In doing so, the majority implicitly held that the Party's nominee selection system—structured as a representative

democracy and not a direct democracy—was inherently unfair.

REASONS FOR GRANTING THE PETITION

I. The Majority’s Holding Empowers Monied Special Interests and Invites Fraud.

The majority asserts that this is a case about “who the deciders are.” Pet. at 20a. That assertion is correct but misplaced in the majority’s application. In reality this is a campaign mounted by interests in the business wing of the Party and some Democrats to gain greater control over Party nomination outcomes. Although “[d]irect democracy was originally a progressive instrument designed to break the power of corrupt state governments and corporations . . . [t]oday it has become a tool of corporations and well-funded interest groups that claim to speak for the people but instead seek only to further their own agendas.”²

A. The group pushing to change the Party’s nominating process was built by local monied interests concerned that the process gave them too little power.

At the May 2010 Utah Republican Party state convention, three-term incumbent U.S. senator Robert F. Bennett was denied the Republican Party’s nomination for a fourth term when the 3,500 state delegates—elected months earlier to represent the

² Cody Hoesly, *Reforming Direct Democracy; Lessons from Oregon*, 93 Calif. L. Rev. 1191 (2005).

Party members in their neighborhoods—chose two other contenders to further compete for the Republican Party nomination in the Party’s primary.³ Because the deadline for appearing as a candidate on the general election ballot without the Republican Party endorsement by his name⁴ had passed, the senator was left with the option of running a write-in campaign, which he declined to do.

Thus began what came to be known as Count My Vote. Within days of the Party’s convention, lobbyist LaVarr Webb invited upwards of thirty business leaders to meet at a local club to reach conclusions on “1. Whether we should tackle the nomination process” and “2. Whether we should form a real advocacy group to achieve our objectives.”⁵ Among others, those business leaders included the director of Lunt Capital Management, the president of Lunt Capital Management, the President and CEO of Zion’s Bank, the community development representative for Zion’s Bank and member of the Downtown Alliance, the

³ Lee Davidson and Bob Bernick Jr., *Utah GOP delegates dump Sen. Bob Bennett at state convention; Bridgewater, Lee to battle in primary*, Deseret News (May 9, 2010), <https://www.deseretnews.com/article/700030688/Utah-GOP-delegates-dump-Sen-Bob-Bennett-at-state-convention-Bridgewater-Lee-to-battle-in-primary.html>.

⁴ Utah allows any candidate who collects a minimal number of signatures to appear on the general election ballot without a party endorsement. Utah Code 20A-9-502. A candidate so nominated “is entitled to all the rights and subject to all the penalties of candidates selected by a registered political party.” *Id.* 20A-9-501(1)(b).

⁵ LaVarr Webb, Email to various business and political leaders (May 20, 2010) (copy provided in Appendix B).

President of Ken Garff Auto Group, the president and CEO of Economic Development Corporation of Utah, a former president of the Salt Lake Chamber of Commerce and former Chief of Staff for U.S. Senator Hatch, a former chair of the Party and board member of the Salt Lake Convention and Visitors Bureau, the president and CEO of Utah World Trade Center, the founding chair of the Utah World Trade Center, a member of the board of directors for Scottish Power, the executive vice president for governmental affairs in the Salt Lake Chamber of Commerce, the former vice president of government affairs for Questar, the senior advisor of Leavitt Partners, the director of the University of Utah Hinckley Institute, the CEO of Leavitt Partners, and former governor Mike Leavitt.

This group began looking at alternative ways of getting party endorsement for their candidates without having to deal with the parties' caucus and convention procedures; as reported, "A small group of well-connected Republicans, including a former governor, have quietly met to discuss ways outside Utah's political convention system to get candidates on the primary election ballot."⁶ Those efforts led to their 2013 launch of the Count My Vote ballot initiative funded primarily through political issues

⁶ Dennis Romboy, *Leavitt group discuss new ways to choose political candidates*, KSL.com (Oct. 12, 2011), <https://www.ksl.com/?nid=960&sid=17628870> (last visited Oct. 31, 2018).

committee “Alliance for Good Government” and “Friends of Count My Vote” corporation.⁷

All told, the group spent more than a million and a half dollars in 2013 and 2014, most of it going to Count My Vote Executive Committee member LaVar Webb’s company The Exoro Group for signature gathering.⁸ It is not insignificant that hefty donations from business leaders (including Democrats) and related organizations supplied almost all the funding.⁹ LaVarr Webb’s publication Utah Policy explained that “[a]s expected, CMV’s donation list is a Who’s Who of Utah business, civic and political institutions.”¹⁰ Once the Utah Legislature incorporated the initiative language into SB54, however, the group halted its initiative efforts, since

⁷ See Disclosures.Utah.gov, Alliance for Good Government, 2013 and 2014 Filed Reports, <https://disclosures.utah.gov/Search/PublicSearch/FolderDetails/1411317> and *id.* Friends of Count My Vote, 2014 Filed Reports, <https://disclosures.utah.gov/Search/PublicSearch/FolderDetails/1412803>.

⁸ See *id.*

⁹ See *Id.* (listing, among others, billionaire business woman Gail Miller supplying \$170,000; Huntsman Corporation \$200,000; the Sandy Chamber of Commerce \$50,000; Mitt Romney Super PAC “Restore Our Future” \$100,000; Mike Leavitt and his companies \$110,000, 1984 Utah Democratic gubernatorial candidate Kem Gardner \$25,000).

¹⁰ Bob Bernick, *Count My Vote Group Raises \$540,000*, Utah Policy (Sept. 3, 2013), <https://www.utahpolicy.com/index.php/features/today-at-utah-policy/390-count-my-vote-group-raises-540-000> (last visited Nov. 1, 2018).

SB54 achieved their goal: they now had a way for their candidates to obtain Party endorsement for the general election ballot without having to deal with the Party's uncontrollable and unpredictable nominating process. They then created a political action committee "CMV PAC" to make contributions to their candidates and target others for defeat in the first election cycle subject to the State's new scheme,¹¹ a scheme under which money can have a much greater impact on outcomes.

B. The Party's nominating system is a hurdle to buying influence.

The Party's nominating process, by contrast, values in-person interaction over the types of electioneering money can buy. Placing a premium on personal interaction over mailers and media buys promotes greater involvement from average ordinary citizens—greater involvement as voters and greater involvement as candidates. It provides a level opportunity for all Party nomination contenders, regardless of wealth and personal connections. Moreover, personal interaction between voters and those contending for Party nomination rewards substance and depth and rewards nomination seekers who align with Party principles while hindering those who don't and hindering incumbents who seek to avoid critical examination on their records.

¹¹ Disclosures.Utah.gov, CMV PAC, 2016 Filed Reports, <https://disclosures.utah.gov/Search/PublicSearch/FolderDetails/1414410>.

The beauty of the Party's nomination process is that it makes personal interaction between each Party nomination voter and each nomination hopeful logistically feasible. Such interaction with every single primary voter simply is not possible. The Party process not only enables personal interaction, success in obtaining the Party's nomination requires that interaction. Senator Bennett recognized this: "Every one of [the delegates] is going to expect me personally in his living room, her living room, knee to knee, answering all of the accusations and all of the problems that they will have heard"¹²

1. The Party's nominating system gives the average citizen an opportunity to play a larger role in politics.

The Party's nominating process is not as susceptible to monied special interest in part because it gives the average citizen an opportunity to play a larger role in politics.¹³ As Count My Vote's LaVarr Webb observed not long before Senator Bennett's loss at the Party's 2010 convention, the Party's elected neighborhood representatives

¹² The New York Times, *Interview With Senator Bennett of Utah, Facing Re-election* (March 25, 2010), <https://www.nytimes.com/2010/03/26/us/26bennettqa.html?action=click&contentCollection=Politics&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>.

¹³ See Equality Utah, *What Is A Delegate and Why Should I Become One?*, at 1 (2012) www.equalityutah.org/images/stories/Equality%20Utah%20Delegate%20Training1.pdf (last visited Oct. 31, 2018).

are schoolteachers, bankers, lawyers, truck drivers, homemakers, and carpenters, hailing from every neighborhood in Utah. What sets them apart is they care about government and they want to participate. They took the time to join a political party, study the issues and the candidates, and to attend their neighborhood caucus and run to become a delegate.¹⁴

He further explained that “[a]ny adult in the state . . . could have done the same, because this system is open to anyone who wants to get involved.”¹⁵ As indeed many do. Though the Party’s caucus turnout was much lower in the years when Mike Leavitt repeatedly obtained the Party’s nomination for governor, in 2010 it jumped significantly,¹⁶ and in 2016 close to 180,000 registered Republicans voted in the Party’s caucuses,¹⁷ a 29% turnout.¹⁸

¹⁴ Frank Pignanelli and LaVarr Webb, *Is it time for Utah to drop the delegate system?* Deseret News (May 2, 2010), <https://www.deseretnews.com/article/700028673/Is-it-time-for-Utah-to-drop-the-delegate-system.html>.

¹⁵ *Id.*

¹⁶ See Jessica Taylor, *Results may spell trouble for Bennett*, Politico (Mar. 24, 2010), <https://www.politico.com/story/2010/03/results-may-spell-trouble-for-bennett-034968>.

¹⁷ CNN Politics, *Election 2016, Utah March 22 caucuses*, <https://www.cnn.com/election/2016/primaries/states/ut/Rep> (last visited Nov. 7, 2018).

¹⁸ Of the 1.2 million active registered voters in Utah at the time, a little over 600,000 were Republican. Utah Lieutenant

The neighborhood representatives thus elected have direct access to examine all those contending for party nomination. And direct access enables them to substantively and repeatedly question contenders on their principles and voting records and to evaluate the contenders based on that personal interaction.

2. The Party's nominating system enables those seeking nomination to do so on a shoe string budget and to be judged on personal interactions rather than on mailers and media buys.

The Party's system makes the process accessible to nomination seekers who don't possess wealth or connections. Because personal interaction, rather than mailers and media buys, is the currency in trade, nomination seekers don't need large campaign chests to be effective—obtaining a Party nomination on minimal funds is realistic. For example, in a (pre-SB54) 2014 Utah House race with three contenders for Party nomination, the nomination winner at 69.8%¹⁹ spent under \$5,000 despite the fact that one

Governor, Elections, Voters by Party and Status, 2016 download, <https://elections.utah.gov/party-and-status> (last visited Nov. 7, 2018).

¹⁹ UCRP.org, 2014 Utah County GOP Nominating Convention Results (April 12, 2014), <https://www.ucrp.org/nominating-convention-results-4122014/>.

of the contenders, a former legislator, spent over \$15,000.²⁰

And nomination seekers don't need to be famous. The role of a delegate is to "give all candidates a fair hearing" and not "blindly support" candidates simply because they are popular.²¹ Thus, the Party process helps level the playing field to attract the best candidates, not just those who have the most money or name recognition. Any candidate can talk with every one of the delegates to earn votes—in group or one-on-one meetings or through personal phone calls. They don't need the best campaign staff money can buy to do this. In many races they don't even need a campaign staff at all. They don't need television ads. They don't need fame or fortune—they just need themselves and their message.

And because a large campaign chest is not needed, the influence of money is constrained. In personal interactions, money can't easily cover up a shallow or

²⁰ See Disclosures.Utah.gov, Brian Greene 2014 Filed Reports, <https://disclosures.utah.gov/Search/PublicSearch/FolderDetails/1411374?sooID=1411328> (spending under \$5,000); Disclosures.Utah.gov, John Stevens 2014 Filed Reports, <https://disclosures.utah.gov/Search/PublicSearch/FolderDetails/1409594> (spending under \$3,000); Disclosures.Utah.gov, Holly Richardson 2014 Filed Reports, <https://disclosures.utah.gov/Search/PublicSearch/FolderDetails/1410536?sooID=1411275> (spending over \$15,000 but receiving only 17 votes).

²¹ Utah County Republican Party Education Officer Lowell Nelson, *UCRP Precinct Officer and Delegate Training Video 006*, at 4:30, <https://www.ucrp.org/precinct-officer-delegate-training-resources/> (last visited Oct. 25, 2018).

disingenuous message or a bad voting record. Nor, in personal interactions, does money easily blur the distinction between those who believe in and will advocate for the Party's principles and those who simply want Party endorsement on the general election ballot.

3. The Party's nominating system disadvantages contenders who have a message inconsistent with the principles the Party espouses.

Political parties "were created by necessity" in order "to coordinate efforts to secure needed legislation and oppose that deemed undesirable," thus the objective of a political party is to exercise its First Amendment rights to see the principles around which it is organized enacted into law. *Ray v. Blair*, 343 U.S. 214, 220-21 (1952). And parties seek to do so by first choosing standard bearers who will work to that end and then working to get those standard bearers elected. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 463 (2008) (Scalia, J., dissenting) ("Parties seek principally to promote the election of candidates who will implement [the party's] views.") Thus, it is essential to a party's purpose that the party's nominees reflect and also seek to advance the Party's principles. Accordingly, parties need a process to distinguish between those who believe in the Party's platform and those who do not.

The Party's nomination process has this objective in mind. Candidates seeking Party nomination

through the Party's process are asked to sign a pledge that they accept the platform as the standard by which their performance will be evaluated. Pet. 54a. And the Party's platform is read at neighborhood caucus meetings to help ensure that all attending are familiar with the Party's core principles. As explained by a Party education officer training delegates: "[T]he Party platform proclaims our values as Republicans. It attracts people to the Party. It is the ideological glue that holds us together. . . . We want our platform to be law, essentially."²² Accordingly, the role of delegates, as the education officer points out, "is to identify the platform candidates and support them" for the Party's nomination.²³ This is the nominee-selection process that, in the Party's view, "will . . . produce the nominee who best represents its political platform." *Lopez Torres*, 552 U.S. at 202 (citation omitted).

Nomination seekers who don't espouse the Party's principles or who have a message inconsistent with the Party's principles are at a distinct disadvantage in the Party's process as they interact with delegates who are measuring them against that platform. This is due, again, to the fact that the process is about personal interaction. While a mailer can vaguely proclaim, "I share your values!", a conversation on the matter may very well lead to a different conclusion. In this way, neighborhood representatives can

²² Utah County Republican Party Education Officer Lowell Nelson, *UCRP Precinct Officer and Delegate Training Video 005* at 7:55-10:05, <https://www.ucrp.org/precinct-officer-delegate-training-resources/> (last visited Oct. 25, 2018).

²³ *Id.*

distinguish between those who are truly interested in advancing the Party's First Amendment expressions and those who are simply interested in advancing themselves to the general election ballot with the Party's endorsement by their name. The Party's process provides for this distinguishing to take place. The State's process for choosing the Party's nominees, on the other hand, does not.

C. SB54 creates a nomination framework more easily manipulated by monied special interests and more open to fraud.

A primary election demands a different kind of electioneering, one that requires more money and thus “places a high premium upon the ability to raise money.” *Lopez Torres*, 552 U.S. at 206. Accordingly, monied special interests have greater influence.

At the outset, those special interests can pave the State-mandated route right on to the primary election ballot for any candidate they want. That is a route easily traversed with money, since a campaign that has enough funds to pay signature gatherers “has a nearly 100 percent chance of qualifying for the ballot in many states.”²⁴ Notably, the signature-gathering process is one that is open to fraud, with workers forging signatures and deceiving signers about what

²⁴ See NCSL, *Law Governing Petition Circulators, Paid vs. Volunteer Petitioners*, <http://www.ncsl.org/research/elections-and-campaigns/laws-governing-petition-circulators.aspx> (last visited Nov. 1, 2018) (discussing petition campaigns).

they are signing.²⁵ Such has been Utah’s experience.²⁶ In fact, as the National Conference of State Legislators recognizes, fraud prevention in the signature gathering process is very difficult.²⁷ As a local signature-gathering company founder and president puts it, given Utah’s current petition process, “fraud ‘is bound to happen again’”²⁸

Beyond fraud issues, in a primary election money dictates access to voters, something that is not the case for the Party’s nominating convention. As those seeking Party nomination cannot feasibly personally meet with every potential primary voter, mailers and media buys are the methodology. And that methodology means money. Those able to buy the best campaign staff and the most and best television and

²⁵ See Mark K. Matthews and Jon Frank, *Fraud, forgery and out-of-state hiring: How Colorado candidates’ path to the ballot became an imperfect industry*, The Denver Post (April 13, 2018), <https://www.denverpost.com/2018/04/13/colorado-elections-ballot-petitions-change/> (last visited Oct. 29, 2018) (explaining the reality of signature collection dogged by fraud).

²⁶ Paighthen Harkins, *Workers forged signatures on Utah petitions for medical marijuana and Count My Vote, charges say*, The Salt Lake Tribune (March 1, 2018), <https://www.sltrib.com/news/2018/03/01/workers-forged-signatures-on-utah-petitions-for-medical-marijuana-and-count-my-vote-charges-say/> (last visited Nov. 1, 2018).

²⁷ See NCSL, *supra*.

²⁸ McKenzie Romero, *2 more employees of signature-gathering company accused of forging names*, Deseret News (Feb. 28, 2018), <https://www.deseretnews.com/article/900011645/2-more-employees-of-signature-gathering-company-accused-of-forging-names.html>.

radio ads have a huge advantage over otherwise good and strong candidates who do not have the same kind of financial backing. Candidates without those resources have little chance of successfully getting their messages out—and very little chance of success. Again, this provides well-heeled special interests a greater role than under the Party’s process—under SB54, monied interests play a pivotal role and can effectively sway the outcome.

And that, in fact, is what the people and business interests behind Count My Vote seek to do. Those interests were large contributors in the 2016 election cycle,²⁹ which should come as no surprise, since changing the nomination framework to give the monied interests behind Count My Vote the broadest influence in nominee selection was the goal all along.

The majority’s holding licenses the State to overrule the Party’s effort to limit the influence of money on nominations and to impose, in violation of the Party’s First Amendment rights, a nomination scheme that allows manipulation by monied interests. That alone is a strong reason for this Court to grant review.

²⁹ See, e.g., Disclosures.Utah.gov, Xani Haynie 2016 Filed Reports, <https://disclosures.utah.gov/Search/PublicSearch/FolderDetails/1414448> (listing numerous Count My Vote backers as campaign contributors).

II. The Majority's First Amendment Holding Undermines the Legitimacy of Representative Democracy.

In finding the State's imposition of a new nominating process justified under the First Amendment, the majority rejects Party application of representative democracy as failing "to ensure that all the party members have some voice in deciding" who their party nominees will be. Pet. at 20a. In doing so, the majority's holding calls into question all associational use of representative democracy as a model for associational decisionmaking and contributes to the public populist misconception that representative democracy is somehow unfair and should be abandoned in favor of direct democracy.

The Party's nomination process, however, gives all Party members a democratic voice in deciding Party nominees through the Party's decision-making structure. As explained in the Party's Petition at 5-6, in local neighborhood meetings open to the public and at which all Party members are invited to vote, Party members elect representatives whose sole function³⁰ is to examine and vet the various candidates on their behalf and then, again on their behalf, decide the Party's nominees.

This type of representative decisionmaking is unquestionably a form of democracy. As explained by

³⁰ As the Petition also points out, the majority conflates these elected representatives with "party leadership." Pet. at 10. But delegates aren't elected to run the Party, they are elected to decide the Party's nominees. *Id.* at 5.

James Wilson, who assisted in drafting the U.S. Constitution and later served as one of the first Justices on the Supreme Court, “[I]n a democracy, [supreme power] is inherent in the people, and is either exercised by themselves or by their representatives.”³¹ In choosing its nominees the Party is governed directly by the representatives elected specifically for that purpose by Party membership. Ultimate power lies with Party members and is exercised through their elected representatives.

There is no allegation that the Party’s neighborhood elections are fraudulently conducted or that they deny participation to some protected segment of citizenry. To the contrary, the entire process is open to public view, and the only qualification for participating, voting, or running to be a neighborhood representative is Party membership. Yet the majority deems this process insufficiently democratic so as to warrant an overhaul by the State. Deriding the Party’s representative democracy as “overly restrictive” and “potentially unrepresentative” (Pet. 20a), the majority finds a compelling State purpose in “ensur[ing] that all the party members have some voice in deciding” Party nominees. This is the purpose that supposedly validates the State’s intrusion on the Party’s First Amendment associational rights—in short, the majority does not believe that representative democracy provides Party members a voice.

³¹ James Wilson, *The substance of a Speech . . . Explanatory of the general principles of the proposed Federal Constitution* 10 (Philadelphia 1787) (spelling modernized).

Ironically, at the same time the majority disparages the Party's nomination process as unfair to Party members, the majority points to the very principles of representative democracy as a hallmark of our country's constitutional scheme (Pet. 28a), as indeed they are. Moreover, given a large community and the logistical difficulties of directly involving every member of the community, representative democracy provides a practical way of implementing democracy. Noah Webster, a father of American scholarship and education, thought a representative democracy the best kind of government practicable in such a situation:

In large communities, the individuals are too numerous to assemble for the purpose of legislation; for which reason, the people appear by substitutes or agents,—persons of their own choice. A representative democracy seems, therefore, to be the most perfect system of government that is practicable on earth.³²

Since, at its core, “Senate Bill 54’s sin lies in taking this option [of representative democracy] away” from the Party (Pet. at 70a), the majority’s ruling that the bill has a compelling purpose underscores the erroneous claim that representative democracy is not fair because it doesn’t ensure that those involved have a meaningful voice. This pronouncement has profound implications, minimally for all associations

³² Horace Elisha Scudder, *Noah Webster* 120 (Houghton, Mifflin & Co. 1881).

who likewise utilize representative democracy in their decisionmaking, and, more broadly, in shaping current attitudes about hallmark principles of our constitutional scheme.

The majority attempts to distinguish other First Amendment expression by associational entities by pointing to the fact that political party nominees appear in “a state-run, state-financed” venue and the party’s nominees may eventually be chosen to apply not just to the party but to “the broader citizenry of the state or district.” Pet. 16a n.6. But a political party’s nominee selection is the expression of a viewpoint under the First Amendment, and the goal of any expressive association that seeks to change law or policy is to have its viewpoints adopted to apply generally. For example, in the federal regulatory rulemaking arena, expressive organizations—in accordance with their First Amendment rights—not only suggest rules and rule changes, they regularly comment on the rules agencies propose, with the purpose and hope that the agency will implement their viewpoint. That public arena, external to the organization, is government run and government financed, and the organization’s viewpoint, if adopted, most certainly will apply to “the broader citizenry” beyond the organization. Under the majority’s reasoning, then, by virtue of inserting its First Amendment speech into the rulemaking arena, the organization opens its decision-making structure up to government alteration. Accordingly, anything advancing the association’s viewpoint during the rulemaking process could be used as a hook allowing government to change the nature of the organization. That reasoning should not be left unexamined.

Besides the specific First Amendment implications for expressive associations, the broader—and perhaps more harmful—implication of claiming that representative democracy doesn’t ensure meaningful voice lies in the effect such a claim has on shaping current attitudes about the representative system established by our country’s constitution. There are calls for revamping the U.S. Senate, which gives states equal representation, from those who consider giving equal votes to less populous states undemocratic.³³ There are calls to do away with the representation that the electoral college gives states in favor of a national popular vote.³⁴ And there are calls for national citizen lawmaking.³⁵ In the midst of a misdirected populist clamor for direct democracy in all things, we would do well to teach the virtues of representative democracy rather than undermine it as “insufficiently democratic.”

Moreover, citing political party use of representative democracy as violating members’

³³ See, e.g., Dylan Matthews, *The Senate is undemocratic and it matters*, Vox (Jan. 6, 2015), <https://www.vox.com/2015/1/6/7500935/trende-senate-vote-share> (last visited Nov. 2, 2018).

³⁴ See, e.g., Mark Weston, *The Electoral College has to go—here’s how we do it*, The Hill (Nov. 23, 2016), <https://thehill.com/blogs/pundits-blog/the-administration/307359-the-electoral-college-has-to-go-heres-how-we-do-it> (last visited Nov. 2, 2018).

³⁵ See, e.g., Daniel Malloy, *Let the People Vote on Their Federal Laws*, OZY, Immodest Proposal (May 4, 2017), <https://www.ozy.com/immodest-proposal/let-the-people-vote-on-their-federal-laws/77015> (last visited Nov. 2, 2018).

rights to have a voice is contrary to the Court’s previous pronouncement on the issue. *See Lopez Torres*, 552 U.S. at 206. Like the claimants seeking to impose a direct primary in *Lopez Torres*, the majority justifies State imposition of a direct primary based, in essence, on Party members’ “right not only to join, but to have a certain degree of influence in the [P]arty.” *Id.* at 203. But the Court in that case declared that “[t]his contention finds no support in our precedents.” *Id.* at 204. Examining the political party’s delegate convention system based on representative democracy, the Court concluded that “[s]election by convention has never been thought unconstitutional, even when the delegates were not selected by primary but by party caucuses.” *Id.* at 206 (citation omitted).

The majority’s creation of a new standard for overriding a political party’s First Amendment associative right to select its nominees is at odds with the Court’s precedent and calls out for review by the Court.

III. Count My Vote Continues to Push for an Even More Reduced Role for the Party’s Nominating Process, and This First Amendment Issue Will Not Be Resolved Legislatively.

The question whether the State has the authority, in the face of the Party’s constitutionally protected rights of association under the First Amendment, to mandate the Party’s nominee-selection process—whether by legislation or by initiative—will continue to divide the state and plague it with election process

uncertainties, unless the Court resolves this issue. Monied interests in the Party's business wing continue—and will continue—to push for an even smaller role for the Party's nominating process, and, despite attempts to repeal SB54 by the Utah House of Representatives, the issue will not be resolved legislatively, since the governor has threatened to veto any repeal measures.

Count My Vote launched another initiative in 2017 that sought to eliminate the remaining vestiges of the Party's nomination process and leave only the State's nomination process.³⁶ Although the organizers modified that goal in the face of public feedback in favor of keeping the caucus-convention system, the revised initiative, nevertheless, sought to further marginalize the Party's selection process by moving the primary election date to the first week in June.³⁷

Since the Party's neighborhood elections aren't held until after Utah's legislative session concludes in mid-March, county and state nominating conventions are not held until the end of April and mid-May to allow delegates sufficient time to meet with and examine all the candidates prior to the nominating conventions. Clearly the candidates who spend their time meeting with delegates and participating in the

³⁶ Utah Lieutenant Governor, Elections, Initiatives and Referenda in Progress, Direct Primary Election, View the Application (Sept. 27, 2017) <https://elections.utah.gov/election-resources/initiatives>.

³⁷ *See id.*, View the Application Addendum 5 (Nov. 8, 2017) <https://elections.utah.gov/election-resources/initiatives>.

Party's process will have little remaining time in which to campaign to primary voters. By comparison, those who don't spend their time participating in the Party's process will have far more time for their primary election campaigns. The incentive is clear: ignore the Party process and focus on the State's primary.

Spending at least \$1.2 million dollars for its second initiative,³⁸ Count My Vote initially garnered enough signatures for the new initiative to qualify for the 2018 November ballot, but enough citizens subsequently removed their names that the initiative fell short. Although Count My Vote has to wait a year before running the same initiative,³⁹ there is no reason to believe the organizers, given their investment thus far, have given up.

Utah House members, on the other hand, have recognized the problems with SB54 and have sought to repeal the measure. The original House sponsor of SB54 sponsored 2018 House Bill 338, to essentially repeal SB54 if Count My Vote's second initiative failed to qualify for the ballot or qualified for the ballot but was rejected by voters.⁴⁰ The House

³⁸ Disclosures.Utah.gov, Count My Vote, Inc. 2017 and 2018 Filed Reports, <https://disclosures.utah.gov/Search/PublicSearch/FolderDetails/1414842> and *Friends of Count My Vote 2016 Filed Reports*, <https://disclosures.utah.gov/Search/PublicSearch/FolderDetails/1412803>.

³⁹ See Utah Code 20A-7-202(5)(f).

⁴⁰ Utah House Bill 338S (2018), <https://le.utah.gov/~2018/bills/static/HB0338.html>.

overwhelmingly passed the repeal bill with members expressing regret over SB54 and characterizing it as an “unmitigated disaster,”⁴¹ but the bill was not considered by the Senate before the session ended. Regardless, the repeal would have been vetoed by the governor, who said, “I think Senate Bill 54 ought to stay as the law of the land unless somehow the courts overturn it,” and promised to veto any measure that seeks to repeal SB54.⁴²

Given the persistence of Count My Vote organizers and the governor’s unwillingness to accept a legislative repeal of SB54, this very divisive First Amendment issue will not be adequately resolved absent this Court’s examination and determination of whether a government may constitutionally impose on a political party the kind of substantive intrusion that SB54 represents.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant review in this case.

⁴¹ Dennis Romboy, *Utah House passes bill to repeal controversial election law*, Deseret News (March 7, 2018), <https://www.deseretnews.com/article/900012294/utah-house-passes-bill-to-repeal-controversial-election-law.html>.

⁴² Dennis Romboy, *Gov. Gary Herbert says Utah GOP would be wise to drop SB54 lawsuit*, Deseret News (Sept. 14, 2017), <https://www.deseretnews.com/article/865688786/Gov-Gary-Herbert-says-Utah-GOP-would-be-wise-to-drop-SB54-lawsuit.html>.

Respectfully submitted,

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November 13, 2018

APPENDIX

APPENDIX A
Amici Curiae

Current Utah Legislators

Utah House:	Marc K. Roberts
Kim F. Coleman	Adam Robertson
Brian M. Greene	Casey Snider
Steve Handy	
Timothy D. Hawkes	Utah Senate:
Ken Ivory	Keith Grover
Michael S. Kennedy	
John Knotwell	
Karianne Lisonbee	
Travis Seegmiller	

Former Utah Legislators

Utah House:	Utah Senate:
Fred Cox	Margaret Dayton
Chris Herrod	Scott K. Jenkins
Jim Nielson	
Curtis Oda	

APPENDIX B

From: LaVarr Webb

To: Miller, Derek B.; Bell, Greg; Edwards, Becky; jeffedwards@MNET.GOED; sbp2627@aol.com; Shumway, Randy; Mecham, Stephen F.; jsunderlage@contentwatch.com; danjones@djasurvey.com; Doug Foxley; Frank Pgnanelli; chriscannon@gmail.com; Walker, Olene; ruland.gill@gmail.com; Howard, Swen; Kirk Jowers; jratkin@infowest.com; robertg@kengarff.com; Lunt, Larry V.; dwright@ksl.com; charlie@leavittpartners.com; Leavitt, Mike; McKeown, Rich; jll@luntcapital.com; Buhler, David; davidhansen@msn.com; kristenjowers@msn.com; fhsuitter@sautah.com; nkarras@skhart.com; Gochnour, Natalie; Riggs, Robin; jordan, david; bob@sykesinjurylaw.com; rm@utahtech.org; Lew Cramer; Anderson, Scott; Christensen, Carlton

Cc: Swaby, Sharyn

Subject: Mainstream Republican Lunch

Date: Thursday, May 20, 2010 7:10:12 AM

All,

We're very much looking forward to the Mainstream Republican Lunch tomorrow, noon, Alta Club. This will be fun! When Larry Lunt and I first discussed getting a group together we thought we might have half a dozen or so. Our invitation struck a very responsive chord and a lot more people are interested in attending than we anticipated.

This demonstrates the high level of concern many Utah Republican leaders have about the tone of our politics and the need for the mainstream majority to assert itself in the selection of our elected officials. We need to ensure that a small, but vocal, faction doesn't

control the nomination process or dominate legislative activity. We are really excited to have you involved. It's a terrific group.

We want to have an open discussion tomorrow and hear all of your concerns and ideas. However, with such a large group we will need to be a little bit disciplined or we will never reach any conclusions or get to action items. We need to be certain we reach some conclusions on two items: 1. Whether we should tackle the nomination process; 2. Whether we should form a real advocacy group to achieve our objectives.

We're pleased that Kirk Jowers has arranged to have a California friend attend who has put together a mainstream Republican coalition in California that has become very influential in California politics. We'll hear from him tomorrow.

Here is a very general agenda to help guide the discussion:

1. Welcome and introductions: Larry Lunt
2. The current political climate
 - a. Mood of voters
 - b. Lack of civility
 - c. Lack of ability to work together to address real problems
 - d. Legislative concerns: leadership elections, immigration, redistricting. etc.
3. The nomination process: Try to change?
4. Do we need an organization? Utah's Mainstream Conservative Coalition?
5. The California Experience

4a

6. If we create an organization ...
 - a. Mission, structure & governance
 - b. Statement of principles
 - c. Recruitment (500 leaders)
7. Next steps: Working group?

Also, Larry had graciously offered to pick up the tab for the lunch. However, that was when we expected six or seven to get together, not upwards of 30. So I'm suggesting that some of us help with the cost of lunch, or each of us pay for our own lunch.

Here's who will be with us at the lunch. There might be one or two others who RSVPed verbally that I didn't get on the list.

Confirmed Attendees:

Larry Lunt
Greg Bell
Scott Anderson
Olene Walker
Chris Cannon
John Lunt
Bob Garff
Doug Wright
Jeff Edwards
Dan Jones
Randy Shumway
Stan Parrish
Frank Switter
Dave Hansen
Kirk Jowers
Jowers' guest from California
Kristen Jowers
Sharlene Hawkes
Becky Edwards

5a

John Edwards
Lew Cramer
Carlton Christensen
Doug Foxley
Frank Pignanelli
Dave Buhler
Derek Miller
Jack Sunderlage
Bob Sykes
Mac Christensen
Swen Howard
Natalie Gochnour
Chuck Akerlow??
LaVarr Webb

Can't Attend, but Want to Support

Mike Leavitt
Nolan Karras
Robin Riggs
Rich McKeown
Ruland Gill
Charlie Johnson
David Jordan
Rich Nelson
Steve Mecham
Ralph Atkin

LAVARR WEBB
The Exoro Group, *www.exoro.com*
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