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Nicholas Sarwark,

The First Amendment unites seemingly unrelated organizations: political parties, religious institutions, non-profit and for-profit alike, and more. We are tied together with the common thread that expressive and associative Rights are a necessary bulwark for groups and individuals to act freely.

We write you about a case we are taking to the U.S. Supreme Court on behalf of the Utah Republican Party. It raises two important First Amendment issues, described in the attached memo, about the autonomy of expressive organizations generally and political parties specifically.

On October 9th we filed a petition for certiorari and would value your support by adding your name to an amicus brief supporting our petition, due about November 12. *There will be no costs to your organization.*

We look forward to further discussion regarding a case with wide-ranging impact.

Sincerely,

Phill Wright,
and others who support our Constitutional Rights

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SCHAERR
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MEMORANDUM FOR ORGANIZATIONS CONCERNED ABOUT FIRST AMENDMENT RIGHTS OF POLITICAL PARTIES AND/OR EXPRESSION

From: Gene Schaerr

Date: October 11, 2018

Re: *Proposed Amicus Brief in Utah Republican Party* v. *Cox*

We write to urge groups concerned about First Amendment protections for political parties and/or freedom of expression to file amicus briefs supporting a petition for writ of certiorari that will raise two important issues about the rights of political parties, candidates and, ultimately, all non-profit expressive organizations. In the case at issue, Utah's Legislature attempted to force the Utah Republican Party to nominate "less extreme" candidates. And the Tenth Circuit held that these efforts did not violate the First Amendment or, indeed, even burden the party, because lay party members were allowed to vote under the Legislature's system.

The attached petition was filed on October 9 and docketed October 11. Accordingly, amicus briefs will be due on Monday, November 12, and a notice to the Utah Solicitor General will be due on Friday November 2.

Issues Presented. As the petition indicates, the case raises two general issues that are important to all political parties, candidates and, indeed, all expressive associations:

1. Does the First Amendment permit a government to force an objecting political party to select its candidates through a primary rather than another selection system (here, a caucus-convention system), in an effort to change the characteristics and views, and hence the messages, of the party's general election candidates?
2. When conducting a First Amendment analysis of a law regulating expressive associations, may a court determine the law's burden based on its alleged impact on the association's members, or must it examine the impact on the association itself, as constituted by its governing documents?

Facts and Proceedings in the Lower Courts. A Utah advocacy group, Count My Vote, argued that Utah's caucus system set up by the Republican Party and other parties should be abolished. Claiming that the caucus system catered to the extremes and discouraged moderation, Count My Vote threatened to fund a ballot initiative that would have reduced or eliminated the caucus system. Rather than let that occur, the Utah Legislature proposed a so-called "compromise" that would require the party's candidate as determined by the caucus/convention system to face in a primary any other registered Republicans who get enough signatures supporting their candidacy. In passing this "compromise," the Legislature not only

adopted one of Count My Vote's initiatives almost word for word, but endorsed the measure on the ground that it would "reduce extremism."

The party sued, claiming the "compromise" violated its freedom of association. The district court granted Utah's motion for summary judgment.

On appeal, a divided Tenth Circuit panel affirmed. In dueling opinions, Judge Ebel and Chief Judge Tymkovich disagreed on whether the panel should follow the logic in *California Democratic Party* v. *Jones*, 530 U.S. 567, 575 (2000), and subsequent cases, or *dicta* in other decisions that Judge Ebel thought pointed to the opposite result. Relying on the *dicta*, Judge Ebel (joined by Judge Lucero) held that the legislation was constitutional. To reach that holding, the panel concluded (as the Ninth Circuit had in a prior case) that the party's First Amendment rights were not significantly burdened by the change in procedure, because party members as a whole probably would not (in the majority's view) care very much about protecting the caucus/convention system.

Chief Judge Tymkovich dissented. He would have held that, because the law was designed to change the messages expressed by the party through its "standard-bearers," i.e., its candidates, the purported procedural reform was actually a substantive reform, one that severely burdened the party's First Amendment rights and was therefore unlawful. He also would have acknowledged that the party, its leadership, and its delegates have First Amendment rights independent of the First Amendment rights of party members.

What we hope to achieve: As noted above, the petition will ask the Court to clarify the law on two questions that affect not just political parties, but all expressive associations. If the Court reverses the Tenth Circuit, we expect the following:

First, political parties will enjoy greater freedom to design their candidate selection processes in a way that matches their views on how best to promote their party platforms. At present, legislatures throughout the Ninth and Tenth Circuits—and other jurisdictions that choose to follow their lead—can manipulate the selection process in a facially neutral way that still substantially affects the types of candidates chosen. A decision reversing the Tenth Circuit will allow parties to better tailor their selection processes to ensure conformity with party platforms.

Second, all expressive organizations will enjoy greater freedom to set their own policies and choose their own representatives, without fear that a future legislature or court will substitute its own views for those of the organization, based on the legislature's or court's speculation about what the organization's members would prefer.

Why your amicus brief is important. Studies show that amicus briefs supporting certiorari substantially enhance the likelihood that the Court will grant review, especially if at least four amicus briefs are filed. We hope you will be able to join this important effort.