No. 18- _____

In the Supreme Court of the United States

UTAH REPUBLICAN PARTY, PETITIONER,

v.

SPENCER J. COX, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As a private expressive association, "[a] political party" enjoys a general First Amendment right "to choose a candidate-selection process that will in *its* view produce the nominee who best represents its political platform." *N.Y. Bd. Of Elections* v. *Lopez Torres*, 552 U.S. 196, 202 (2008). The First Amendment thus gives "special protection" to "the process by which a political party selects a standard bearer" *California Democratic Party* v. *Jones,* 530 U.S. 567, 575 (2000). Here, however, the Tenth Circuit has joined the Ninth in permitting a government to force a political party to select candidates through a primary rather than a caucus system, for the viewpoint-based purpose of avoiding candidates with "extreme views."

The questions presented are:

1. 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?

2. When evaluating the First Amendment burden of a law affecting expressive associations, may a court consider only the impact on the association's members, instead of analyzing the burden on the association itself, as defined by its own organizational structure?

LIST OF PARTIES

The names of the parties are listed on the cover, excepting the Utah Democratic Party, which was an intervenor below and cross-appealed to the Tenth Circuit and is thus a Respondent here. Respondent Spencer J. Cox is a Respondent only in his official capacity as Lieutenant Governor of Utah.

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INTRODUCTION

For at least the last half-century, this Court has virtually always stepped in when a government attempts to interfere with a political party's autonomy—even though such cases rarely involve a conflict among the lower courts. This Court's willingness to do so reflects, first, a recognition that "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views," and that party autonomy is essential to citizens' ability to "band together" for that purpose. *California Democratic Party* v. *Jones,* 530 U.S. 567, 574–575 (2000). The Court's willingness to grant review in such cases also reflects a recognition that a single law that intrudes upon party autonomy may not only determine the political rights and opportunities of hundreds of thousands—or millions—of voters, but may also dramatically influence the laws enacted by governments within the affected jurisdiction.

This is such a case. Here, a group that disagreed with the views of candidates nominated by the Utah Republican Party persuaded the legislature to enact a law—known as SB54—expressly designed to influence the Party to nominate less "extreme" candidates. The law accomplished that objective by effectively forcing the Party—as a condition of having its nominees listed on the general election ballot—to accept as Republican "nominees" candidates who flout the neighborhood caucus-convention nominating system that has long been a central feature of the Party's bylaws.

The legislature did so, moreover, in the face of this Court's consistent teaching that "the First Amend-

ment reserves" a "special place *** and *** special protection" for the internal "process by which a political party 'select[s] a standard bearer ***." *Id.* at 575. Indeed, this Court has emphasized that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Ibid.* For those reasons, the Court has consistently held that, subject only to non-discrimination and fairness requirements, "[a] political party has a First Amendment *right*" "to choose a candidate-selection process that will in *its* view produce the nominee who best represents its political platform." *N.Y. Bd. Of Elections* v. *Lopez Torres*, 552 U.S. 196, 202 (2008) (emphasis added).

Nevertheless, in a two-to-one decision, the Tenth Circuit upheld SB54 against the Party's First Amendment challenge, based upon what the majority called "considered dicta" originating in this Court's decision in *American Party of Texas* v. *White*, 415 U.S. 767, 781 (1974). Disagreeing with his colleagues' reading of those dicta, Chief Judge Tymkovich dissented—and in so doing urged this Court to adhere to its long-standing practice of granting review in cases implicating political parties' associational rights.

OPINIONS BELOW

The Tenth Circuit's decision is published at 885 F.3d 1219 and reprinted at 1a. The order denying rehearing *en banc* is published at 892 F.3d 1066 and reprinted at 97a. The district court's opinion granting summary judgment to respondent is published at 178 F. Supp. 3d 1150 and reprinted at 101a.

JURISDICTION

The Tenth Circuit issued its decision on March 20, 2018. Rehearing *en banc* was denied on June 8, 2018, making this petition due on September 6, 2018. Justice Sotomayor granted an extension to October 8, 2018, which is Columbus Day, making the petition due on October 9, 2018. See Rule 30.1. This Court has jurisdiction under 28 U.S.C.1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides: "Congress shall make no law *** abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."

The "Either or Both" provision of SB54, codified at Utah Code 20A-9-101 is as follows:

(12) "Qualified political party" means a registered political party that:

(a) (i) permits a delegate for the registered political party to vote on a candidate nomination in the registered political party's convention remotely; [and] ***

(c) permits a member of the registered political party to seek the registered political party's nomination for any elective office by the member choosing to seek the nomination by either or both of the following methods:

(i) seeking the nomination through the registered political party's convention process, in accordance with the provisions of Section 20A-9-407; or (ii) seeking the nomination by collecting signatures, in accordance with the provisions of Section 20A-9-408 ***

STATEMENT

A. Legal framework

This Court has consistently held that political parties are *private* expressive associations entitled to the First Amendment freedom of expressive association. *E.g., Jones*, 530 U.S. at 573. The Court has further explained that enforcement of this freedom is especially important in "the process of selecting [a party's] nominee." *Id.* at 575. That is because:

- the party's nominee selection process "determines the party's positions on the most significant public policy issues of the day,"
- "the nominee [] becomes the party's ambassador to the general electorate in winning it over to the party's views," and
- the nominee can become "virtually inseparable" from the party.

Ibid.

Indeed, this Court has said that "a party's choice of a candidate is the most effective way in which the party can communicate to the voters what the party represents and, thereby, attract voter interest and support." *Ibid.* (quoting *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 372 (1997) (Stevens, J., dissenting)). Accordingly, except where necessary to avoid discrimination or unfairness, "[a] political party has a First Amendment right" "to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform." *Lopez Torres*, 552 U.S. at 202.

Under the so-called *Anderson-Burdick* test, this Court applies strict scrutiny to severe burdens on a party's autonomy, but rational basis review to "only

modest burdens." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 452 (2008); see also *Anderson* v. *Celebrezze*, 460 US. 780, 789 (1983); *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992). Thus, laws that impose a severe burden on party autonomy—like the one struck down in *Jones*—receive strict scrutiny. See *Jones*, 530 U.S. at 585.

B. SB54 and the Party's caucus-convention system

The problem at the heart of this case is that the Utah legislature has manipulated the way in which the Utah Republican Party chooses its candidates in order to alter the likely viewpoints of those candidates.

1. For virtually its entire history, the Party has selected candidates through a democratic neighborhood caucus and convention system. That system allows *all* Party members to have a meaningful voice in deciding who will represent the Party in the general election.

Every election cycle, Party members in each neighborhood gather in a caucus meeting, which is open to the public. The caucuses elect delegates to vet each candidate on behalf of the neighborhood, and to represent the neighborhood in selecting the Party's candidates—or narrowing the field to two candidates—at a subsequent nominating convention.[1] Until 2014, Utah law accommodated the Party's caucus-convention sys-

[1] Party leadership is elected by those neighborhood delegates the following year at county and state organizing conventions: County delegates elect the State Central Committee—"the governing and policy-making body of the Party," while state delegates elect the state Party officers. Utah Republican Party 2013 Constitution arts. IV, XII § 7.D.

tem by allowing a political party to field general-election candidates through either that system, an ordinary primary election, or some combination. See Utah Code 20A-9-403 (2013).

Dissatisfied with some of the candidates the neighborhood caucus system had produced, a group known as Count My Vote sought to change the selection system. The group first urged the Party itself to eliminate the caucus-convention system in favor of a primary. When this failed, the group proposed a ballot initiative to the same effect. The group then went to the Utah legislature, which passed a bill, SB54, that "incorporated almost the entire language, verbatim, of Count My Vote's ballot initiative." JA 60. While SB54 kept the caucus-convention system as a purported option alongside Count My Vote's reforms, it required—in its "Either or Both" provision—that any party wishing to keep a caucus system also allow party members to get on the primary ballot by gathering signatures.

2. The record explains that "the stated purpose of the Count My Vote efforts was to change the Utah election code for the purpose of affecting the *message* * * * [of] the Utah Republican Party in its chosen candidate selection process." Utah Republican Party Supplemental Appendix 70 (10th Cir. Dec.12, 2016) (emphasis added) (declaration of Party Chairman James Evans) . Indeed, "Count My Vote promised" that if enacted, its proposal would "cause the Party to nominate candidates with less 'extreme views.'" *Id.* at 72. The evident purpose of Count My Vote and SB54 was thus to change the views and messages of the Party and its candidates. See also, *e.g.*, Pet. 66a n. 9, 69a n. 12, 80a n. 20, and accompanying text (Tymkovich, J., dissenting).

In response, the Utah legislature was candid in describing the purposes of SB54 to include reducing the prospect that the Party would select candidates that Count My Vote labeled "extreme," and enhancing the prospects of nominees with "competing philosophies."[2]

To achieve its viewpoint-altering goals, SB54 removed the candidate-selection flexibility that Utah law previously allowed. Instead, as a condition of access to the general election ballot, SB54 limited parties' candidate selection processes to only two paths, one of which would eliminate the caucus-convention system altogether, and the other of which would sharply limit that system's influence in the ultimate selection of a party's candidates.

Specifically, SB54 divided political parties into two classes. A party that is willing to select its general-election candidates only through a state-run primary is deemed a "Registered Political Party." Utah Code 20A-9-403(3)(a).). On the other hand, a party that wishes to continue using the caucus-convention process at all can be a "Qualified Political Party." Under the "Either or Both" provision quoted above, such a party can have its candidates listed on the general-election ballot, with their party affiliation, but *only* if the party also allows a candidate the alternative of forcing a primary election by gathering a certain number of signatures. See Utah Code 20A-9-101.

3. The implications of SB54 for the Utah Republican Party were clear from the beginning: If it wanted

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[2] Senate Day 24, Utah Legislative Session 2014 53:00–60:00, http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=16742&meta_id=494855; *see also* Pet. 66a n. 12 (Tymkovich, J., dissenting).

to remain a viable political party, it could choose the "registered party" route and jettison its preferred caucus-convention system entirely. Or it could choose the "qualified party" route, thus allowing candidates to *bypass* the caucus-convention system through a petition process, and thus forcing a primary election against the candidate who won in the convention pursuant to the Party's bylaws.

In other words, if the Party wanted to preserve any role for its caucus-convention system, it would have to allow candidates to declare themselves Republicans (even by switching parties) and buy their way onto the primary ballot through a petition drive, without showing any loyalty to the Party's platform or message. And if they succeeded in the primary, they would be listed under the Party's name on the general election ballot despite never being approved under the Party's own processes. SB54 would thus force the Party to accept candidates whose only real affiliation with the Party was checking a box on a state voter registration form—and in so doing would make the caucus-convention system nearly meaningless.

Finally, if the Party failed to comply fully with one option or the other, any general election candidates the Party put forward would be treated as unaffiliated—that is, *not* Republican. Utah Code 20A-6-301(g).

The legislature passed SB54 despite warnings from some legislators that "the right [to choose nominees] belongs with the party, not with the state legislature."[3]

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[3] House Day 37. Utah Legislative Session 2014, 1:36:00, 1:38:57 http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=16993&meta_id=499192 (Rep. Ivers).

C. Procedural History

In the district court, the Party sued, asserting a First Amendment challenge to (among others) the provisions of SB54 requiring the Party to violate its bylaws and accept candidates who pursue the signature path to the ballot. Pet. 101a. Respondent Utah Democratic Party intervened in support of the statute.

1. The district court converted a motion for judgment on the pleadings by Respondent Cox into a motion for summary judgment, which the court then granted. In so doing, the district court never acknowledged the evidence that the legislature enacted SB54 in part because Count My Vote wanted to change the nature of the candidates nominated by the Party, and thus the Party's message to voters. Having failed to recognize the evidence on SB54's purpose or effect, the district court concluded as a matter of law that SB54 does not severely burden the Party. Pet. 167a–181a. It reached that conclusion despite the Party's showing that SB54 burdens it in several ways, including effectively overruling

- internal Party rules governing candidate selection,
- the Party's right to control the use of the Party's name, and
- its right to enforce compliance with the Party platform and internal rules, and
- its right *not* to publicly associate with candidates who have not demonstrated their loyalty to the Party, its platform and internal processes. *Ibid.*

2. On appeal, a divided Tenth Circuit panel affirmed, concluding that the First Amendment burdens SB54 places on the Party are minimal. Ignoring that delegates elected at neighborhood caucuses rarely have leadership roles in the Party, the majority framed the issue as a choice between the views of the Party's "leadership" and those of the rank and file. Pet.20a, 22a. The majority recognized that the views of Party lay members may contradict the Party's views, as expressed through processes mandated by its bylaws. See Pet. 21a. But the majority nevertheless concluded, as a matter of law, that "SB54 was not designed to change the substantive candidates who emerged from the parties," and thus "does not impose a severe burden on the [Party] by potentially allowing the nomination of a candidate with whom the [Party] leadership disagrees." Pet. 21a, 26a.

The majority reached its conclusion about the supposedly minimal burdens imposed by SB54 by relying, not on the most recent decision of this Court in which a state attempted to change the political views of a party's candidates—*Jones*—but instead on dicta in *Lopez Torres* and other cases suggesting that states are "permitted [] to set their faces against 'party bosses' by requiring party-candidate selection through processes more favorable to insurgents, such as primaries." Pet. 18a (quoting *Lopez Torres*, 552 U.S. at 205. While acknowledging this language is dicta, the majority felt it was "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings." Pet. 18a (quoting *Gaylor* v. *United States*, 74 F.3d 214, 217 (10th Cir. 1996)). Based on these dicta—but without any evidence that "party bosses" (as opposed to thousands of elected neighborhood delegates) were controlling Party candidate selection in Utah—the majority

concluded that the relevant portion of SB54 was "only minimally burdensome on" the Party. Pet. 20a.

The majority also concluded (at Pet. 20a–23a) that the associational rights of the Party are held by the Party's 600,000 members, not the party itself, as determined by its internal bylaws or other governing documents. Again confusing elected neighborhood delegates with "party leadership," the majority concluded that "the associational rights of the party are not severely burdened when the will of those voters might reflect a different choice than would be made by the party leadership." Pet. 23a. The majority thus vested First Amendment associational rights in the Party's individual members, rather than in the Party itself, as constituted by its own internal, foundational rules, or in the thousands of neighborhood delegates authorized by the Party's bylaws to make decisions for the Party.

3. Chief Judge Tymkovich dissented. Relying upon record evidence and other material subject to judicial notice, he detailed how SB54 was a purposeful effort to change the "substantive type of candidates the Party nominates, all the while masquerading as mere procedural reform." Pet. 51a. He also explained that SB54 imposes multiple severe burdens on the Party, "transform[ing]" it "from a tight-knit community that chooses candidates deliberatively to a loosely affiliated collection of individuals who cast votes on a Tuesday in June." Pet. 65a. And he systematically explained why none of the governmental interests asserted on behalf of SB54 holds water, much less justifies SB54's severe intrusion into party autonomy. Pet. 78a–84a.

He also disagreed with the majority's conclusion that the Party's associational rights rest only with its

rank-and-file members. He noted that "[a] political party is more than the sum of its members" and that "[p]arties have associational rights that are distinct from those of the individuals that form its membership." Pet. 73a.

He thus would have held that SB54's "reforms" violate the First Amendment. Pet. 93a.

4. The Party sought rehearing *en banc*, raising the two questions presented in this petition.

Although the Tenth Circuit denied rehearing and rehearing en banc, Chief Judge Tymkovich wrote separately "to note the issues raised" by the *en banc* petition "deserve the Supreme Court's attention." Pet. 99a. One reason review is warranted, he said, is that the panel opinion followed "an oft-repeated strand of Supreme Court dicta which, as [his] dissent argues, has outlived its reliability." Pet. 99a He further explained that review is warranted because of "facts on the ground" that make "the party system [] the weakest it has ever been—a sobering reality given parties' importance to our republic's stability." Pet. 99a. Because of these factual and legal changes, he concluded that "[t]he time appears ripe for th[is] Court to reconsider (or … consider for the first time) the scope of government regulation of political party primaries and the attendant harms to associational rights and substantive ends." Pet. 99a–100a.

REASONS FOR GRANTING THE PETITION

As Chief Judge Tymkovich emphasized, the two questions presented here are important, not only because they impact every Utah party, election and voter, but also because they have sweeping implications for all political parties and, indeed, all non-profit organizations. If the decision below stands, legislatures across the Tenth Circuit and beyond will be authorized to regulate or coerce political parties, service organizations, and even religious institutions, to change the views held by their standard-bearers and thus expressed by the organization. Such quintessential viewpoint-based regulation or coercion, impacting core political speech, is both unprecedented and incompatible with the First Amendment.

I. The majority's holding on the scope a government's power over a party's candidate-selection system warrants review.

The first question merits review, not only because of its effects on the Party and Utah voters, but also because the panel decision conflicts with the reasoning of *Jones* on a question that is crucial to every political party: whether a government may effectively regulate, directly or indirectly, the internal decision-making of a private expressive association in order to alter the nature of its standard bearers and the views it and they express. As the opinion below illustrates, courts are now relying on dicta to answer that question "yes" despite *Jones*' opposite conclusion. As Chief Judge Tymkovich stressed, the sweeping implications of the Tenth Circuit's decision require consideration by this Court.

A. In flouting *Jones*, the decision below severely undercuts core First Amendment rights of all political parties.

This Court has never approved anything close to what the panel did here: authorize a government to skew a party's choice of candidates and thereby force it to accept "competing philosophies" and more "moderate" politicians. As the dissent explains (at Pet.64a), SB54 "changes the types of nominees the Party will produce and gives unwanted candidates a path to the Party's nomination." And there is no doubt that SB54's purpose and effect make it unconstitutional under the First Amendment, as interpreted in *Jones*.

1. *Jones* concerned California's Proposition 198, which created a "blanket primary" in which any Californian could vote for candidates from any party, regardless of the voter's party affiliation. The proposal was passed—in the words of its proponents—to "weaken party hard-liners and ease the way for moderate problem-solvers." 530 U.S. at 570. But the Court held that effort violated the First Amendment, noting that "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee." *Id.* at 575. The Court went on to emphasize the "special protection" the First Amendment gives to "the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences.'" *Ibid.* (citation omitted) (quoting *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 224).

Jones also examined Proposition 198's real-world impact on the election process. The record showed there were "significantly different policy preferences between party members and primary voters who

'crossed over' from another party." 530 U.S. at 578. But, despite statistical and expert testimony on this point, the Court ultimately relied on "the whole purpose of Proposition 198"—that is, the purpose expressed by those encouraging "moderate" candidates—in holding it invalid under the First Amendment. *Ibid.*

While *Jones*' itself concerned the forced inclusion in a primary of voters who were not party members, *Jones*' logic forecloses the Tenth Circuit's holding. *Jones*, like this case, involved attempts to manipulate *who* chooses the party's representatives, and hence the messages that will be advanced under the party's banner. Like Proposition 198, SB54's stated "purpose" was to encourage more "moderate" views among the Party's nominees. And, when crafting SB54, the legislature adopted Count My Vote's views and language, with a sponsoring legislator stating while introducing the bill that it was designed to promote "competing philosophies"—i.e., philosophies that differ from those of the Party's elected neighborhood delegates.[4]

By attempting to "moderate" the Party's nominees, SB54 plainly moved the Party's nominating system *away* from choosing the "standard bearer who best represents the party's ideologies and preferences." *Jones,* 530 U.S. at 575. The Party itself has carefully chosen a process—the caucus-convention system—for selecting the Party's positions and ideological standard-bearers. That system reflects a belief—to which the duly constituted Party is entitled under the First

[4] See n.2, supra., *accord* 79a (Tymkovich, J., dissenting). Evidence of Count My Vote's and the legislature's intent is not only cited in Chief Judge Tymkovich's dissent, but is also in the record and/or properly subject to judicial notice. See, *e.g.*, JA45; URP Supplemental Appendix at 55; Fed. R. Evid. 201.

Amendment—that members who merely register to vote as Republicans, but do not invest the time to discuss the issues and candidates in neighborhood caucuses, are not as likely to reflect the Party's values and beliefs as members who attend the caucuses.

Extending control over nominations from caucus attenders to all who choose to check a box indicating their affiliation with the Party on primary election day—as SB54's Either or Both provision does—dilutes the influence of party members who have invested the time to research the candidates and issues, and discuss them in their neighborhood caucuses.[5] As Judge Tymkovich put it (Pet.64a), that clause creates a state-

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[5] Nor is there any merit to the majority's contention (Pet.30a) that a primary system is necessary to give citizens an "effective voice in the process of deciding who will govern them." Utah's caucus-convention system gives *all* party members an "effective voice" in that process. See 5, *supra*.

A caucus-convention system also has other advantages over a primary system: It reduces the importance of incumbency, name recognition, and money; encourages more serious deliberation over issues; and encourages more interaction between candidates and voters. See Priya Chatwani, Note, *Retro Politics Back in Vogue: A Look at How the Internet Can Modernize the Reemerging Caucus*, 14. S. Cal. Interdisc. L.J. 313, 316-17 (2005) (noting that the "main strength of the [caucus-convention] system" is the "process of deliberating about issues and *** persuad[ing] voters to lend their support to a given candidate ***."); Eitan Hersh, *Primary Voters Versus Caucus Goers and the Peripheral Motivations of Political Participation*, 34 Pol. Behav. 689 (2012); David P. Redlawsk et al., *Why Iowa?: How Caucuses and Sequential Elections Improve the Presidential Nominating Process* (2010) (compared to a primary system, the Iowa Caucus encourages greater candidate interaction with voters as opposed to impersonal campaign advertising).

created "majority veto over the candidates a party selects through its carefully crafted convention process."

2. Not only are the effects of the proposition in *Jones* remarkably similar to the effects of SB54, but the panel majority followed Justice Stevens' *dissent* in that case. He argued that the "protections that the First Amendment affords to the 'internal processes' of a political party do not encompass a right to exclude nonmembers from" a partisan open primary. 530 U.S. at 595–96. And his argument was nearly identical to the majority's argument here: Because a primary involves a "state-run, state-financed ballot," a party has a less compelling interesting in the internal process of selecting its candidates than a church or other association has in selecting its leaders. See Pet. 15a, 17a n.6. Some of Utah's legislators apparently embraced this same view.[6]

But in *Jones,* the majority squarely rejected Justice Stevens' argument. The Court reasoned instead that a party's chosen candidate selection process requires strong First Amendment protection because "a party's choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support." *Id.* at 575. The Court thus rejected the very kind of intrusion into party autonomy that the majority approved here.

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[6] House Day 37 Utah Legislative Session 2014, http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=16993&meta_id=499192 (Rep. Powell) (arguing that legislature can control political parties in different ways than other associations because "a political party asks to have its name appear on a public ballot").

The majority here (at Pet 21a) denied that the purpose of Count My Vote was "to change the substantive candidates who emerged from the parties." But as the dissent details, the *undisputed* record shows that SB54's proponents indeed sought to affect the *type* of candidates a party chooses, based on a desire for "competing philosophies" and less "extreme" views. *See supra* 20–21. Because SB54 interferes with the Party's ability to advance its own messages, *Jones* forecloses the majority's holding. At a minimum, the evidence forecloses summary judgment against the Party.

Jones, moreover, is merely one of a long line of decisions rejecting restrictions on a party's freedom to choose how it selects its candidates. In 2008, this Court noted in *Lopez Torres* that the First Amendment generally protects a party's "right to *** choose a candidate-selection process that will *in its view* produce the nominee who best represents its political platform." 552 U.S. at 202 (emphasis added). To be sure, *Lopez Torres* recognized exceptions for regulations designed to prevent discrimination or unfairness, see 552 U.S. at 202, but neither the majority nor the State attempted to defend SB54 on either of those grounds.

For similar reasons, in 1986, the Court in *Tashjian* v. *Republican Party*, 479 U.S. 208 (1986), held that a party has a constitutional right to choose an open primary, despite a state law demanding a closed primary. But here, by allowing a legislature to override the Party's own "view" of the "candidate-selection process that will produce the nominee who best represents its political platform," *Lopez Torrez,* 552 U.S. at 202, the Tenth Circuit majority has departed from this Court's teachings.

3. If allowed to stand, the majority's logic will subvert the interests of all political parties.

First, every political party—and every other expressive association—has internal rules and procedures. As discussed above, protecting an association's ability to promulgate and enforce such rules is essential to the right of expressive association that the First Amendment protects.

Second, this Nation's increasing polarization and partisanship often drive legislators, once elected, to use any technique they can to defend their electoral majorities. Granting legislators the ability to use "procedural" reforms to modify a party's choice of candidates—as the decision below does—empowers legislators to reshape the party's choice of candidate to favor their own re-election. Worse yet, such a power allows legislators from *opposing* parties to craft policies that promote candidates who will be easily defeated in general elections.

Third, "outsider" candidates are becoming a dominant force in American politics. Given that these candidates frequently defy accepted political norms, to remain viable, political parties must be allowed the tools necessary to ensure such candidates' loyalty to the party that nominates them.

Here, the Party's traditional caucus-convention system gives Utahns a measure of protection against candidates who do not actually represent their party and its values. By having neighborhood-selected delegates carefully vet all candidates, including "outsiders," the caucus-convention system increases the odds that the party's principles will remain intact.

Indeed, those states that used the caucus system for the 2016 presidential election—including Utah—tended to nominate different candidates than the states that held closed or open primaries.[7] This held true for both major political parties. Cf. David P. Redlawsk et al. *Why Iowa?: How Caucuses and Sequential Elections Improve the Presidential Nominating Process* (2010) (cited at Pet 53a (Tymkovich, J., dissenting)).

But the Tenth Circuit's decision would cripple any effort by state parties to reform their presidential nominating processes for 2020, or to adopt caucuses or other measures as a way of holding insurgent, "outsider" candidates more accountable.

4. These risks to political parties are well illustrated in this case. For example, current U.S. Congressman John Curtis initially was rejected by the neighborhood delegates. And he had several significant differences with the convention-chosen candidate, Chris Herrod, including Curtis' refusal to align with the current national party leader and his previous stint as a Democratic Party chair.[8] Curtis's subsequent electoral victory illustrates that SB54 was effective in modifying the message of the Party, just as Proposition 198 was effective in modifying the party's message in *Jones*. Curtis was able, in Judge Tym-

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[7] See Politico, Key Presidential Party Candidates by State, https://www.politico.com/mapdata-2016/2016-election/primary/results/map/president.

[8] Matthew Piper, *The Agony of John Curtis*, Deseret News, Jan. 4, 2018; Courtney Tanner, *GOP candidates to replace Chaffetz snipe at front-runner John Curtis*, Salt Lake Tribune, July 30, 2017.

kovich's words (at 64a), to "ignore [the] [P]arty's chosen convention procedures without ever having to convince other members to vote to change those procedures." If the decision below stands, other legislatures' attempts to modify parties' political positions and candidates will likely be similarly effective.

In short, as Judge Tymkovich explained, without any compelling governmental interest SB54 "interferes with the Party's internal procedures, changes the kinds of nominees the Party produces ***, allows unwanted candidates to obtain the Party nomination, causes divisiveness within the Party, and reduces the loyalty of candidates to the Party's policies." Pet.69a. If those are not severe burdens on a political party within the meaning of *Jones* and other decisions of this Court, it is hard to imagine what is. [9]

5. The Ninth Circuit has also reached essentially the same result as the Tenth Circuit in *Alaska Independence Party* v. *Alaska*, 545 F.3d 1173 (9th Cir. 2008)—a case in which review in this Court was not sought.

There, the state disallowed parties from placing candidates on the primary ballot as they had previously done. *Id.* at 1175–1176. Instead, any *member* of the party could place themselves on the primary ballot

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[9] As explained by the dissent, the panel's assertion (at Pet. 27a–30a) that the Utah legislature had a sufficient interest in SB54 relies almost entirely on a mischaracterization or misunderstanding of the Party's caucus-convention process and on a government's supposed right to enact any procedural reform that in its view allows it to better "manage" primary elections. For reasons explained by Judge Tymkovich, the majority's analysis of the governmental interests violates multiple decisions of this Court, and is an additional reason for this Court's review.

so long as they met several state requirements. *Ibid.* The parties objected to the law because it forced them to associate with candidates that "are not ideologically compatible with the party." *Id.* at 1175. But the Ninth Circuit ruled the state law was facially constitutional because it imposed only a minimal burden on the parties. *Id.* at 1179. Like this case, *Alaska Independence Party* also impermissibly restricts the right of parties to choose candidates based on the party's own chosen criteria.

For all these reasons, Question 1 richly merits this Court's plenary review.

B. As the dissent explains, the dicta of this Court on which the majority relied are outdated and doing serious harm to already weakened political parties.

Instead of squarely confronting the reasoning of *Jones*, the majority below relied on what it admitted was dicta from a handful of other decisions. However, as the dissent explains, *Jones* demonstrates that these dicta are "little more than a nod to received wisdom," Pet.100a, and are outdated.

1. The dicta on which the majority relied stem ultimately from *American Party of Texas* v. *White*, 415 U.S. 767 (1974). *White* concerned challenges by minor parties to a Texas law that limited their means of choosing nominees to a convention. In rejecting an argument that the convention system was overly burdensome, the Court noted that a "[s]tate may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention." *Id.* at 781.

Absent from *White*, however, was any allegation or suggestion that the state was seeking to change the *views* of the minor parties or their candidates. The changes were challenged because the procedures themselves burdened the parties. And *White's* holding was purely procedural: "the convention process is [not] invidiously more burdensome than the primary election." *Id.* at 781.

None of this Court's decisions citing *White*'s dicta, moreover, stands for the proposition that a government may seek to influence the views and positions of candidates who will represent the party. To be sure, *Jones*, 530 U.S. at 572, and *Lopez Torres*, 552 U.S. at 205, repeated the dicta, but neither held or hinted that governments can attempt to "forc[e] political parties to associate with those who do not share their beliefs." *Jones*, 530 U.S. at 586. Both decisions stand for the opposite proposition. See *id.*; *Lopez Torres*, 552 U.S. at 202.

However, as in *Jones*—and unlike *White*—the record here demonstrates that SB54 was *designed* to influence the types of candidates ultimately selected by the Party and, therefore, "what the party represents." *Jones*, 530 U.S. at 575. Moreover, unlike *White*, the Party's caucus-convention system in this case is itself based upon a political view and message: that proactive neighborhood political participation through elected community representatives is vital to the Party's own determination of whom to endorse; that incumbents and other potential office holders should be vetted by such delegates before earning the Party's endorsement; and that Party-endorsed candidates should thereafter be held accountable to such delegates and their neighborhoods. SB54 was designed to

disadvantage that specific political view and message within a private political party, and thereby to alter the Party's views and messages.

2. If allowed to stand, the majority's extension of *White*'s dicta will undermine the autonomy of virtually every national and state political party. Armed with the Tenth Circuit's decision and the Ninth Circuit's *Alaska* decision, legislatures across the nation can now treat the *White* dicta as binding precedent that cabins—or effectively overrules—*Jones*' prohibition on government efforts to change a party's message. Instead, the Ninth and Tenth Circuits' decisions would allow incumbent legislators to target with "procedural" reforms political parties that incumbents—or other powerful groups—deem insufficiently pliable. This would elevate the voices and views of party members who favor such groups at the expense of other party members, thereby changing the party's message.

Given that the court below mistakenly used the dicta from *White* and other cases to undercut *Jones'* application to this case, these dicta should be narrowed or repudiated. As both Judge Tymkovich and academic commentators have noted, this Court has recently narrowed the dicta's logic[10]—but obviously

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[10] Pet. 86a (quoting Richard L. Hasen, *"Too Plain for Argument?" The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees Through Direct and Equal Primaries*, 102 Nw. U. L. Rev. 2009, 2010 (2008) ("cases recognizing the parties' rights to overrule the states on the open or closed nature of political primaries" makes the status of this dicta "uncertain") and Nathaniel Persily, *Toward a Functional Defense of Political Autonomy*, 76 N.Y.U. L. Rev. 750, 785 (2001) (*Jones* follows a long line of cases upholding party autonomy and "the reasoning in *Jones* would extend to all types of primary systems")).

not enough to keep the majority below from going astray.

3. The dicta are also unworkable—indeed, dangerous. As the dissent notes, "the party system is the weakest it has ever been—a sobering reality given parties' importance to our republic's stability." Pet.100a. And the Tenth Circuit's application of *White*'s dicta further erodes the power of the parties, shifting their influence to already-entrenched legislators.

Because the Tenth Circuit viewed itself bound by the *White* dicta, this Court's intervention is needed. While those dicta are not binding precedent of this Court, the fact that the court below erroneously *believed* them to be binding means that their scope is at best unclear in light of *Jones*. Only this Court can resolve the confusion.

C. The decision below will adversely affect millions of voters.

The panel opinion will also have sweeping consequences for Utah voters. First, the 600,000-plus registered Republicans in Utah[11] will lose the right to determine the collective views and endorsements they will express through the representative caucus system chosen by the Party.

Second, all 1.6 million of Utah's voters will be at risk of being misled by the false implication that any "Republican" candidate is endorsed by the Party, pursuant to its beliefs and standards. As Judge Tymkovich explained, voters will no longer be able to judge

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[11] See Voters by Party and Status, https://elections.utah.gov/party-and-status.

candidates based on party affiliation, as a nominee selected outside the Party's chosen system may well hold views in tension with the stated party platform. See Pet. at 69a (Tymkovich, J., dissenting); see also *Rosen* v. *Brown*, 970 F.2d 169 (6th Cir. 1992) (discussing importance of party names). What those voters will likely see instead will be a series of Manchurian Candidates bearing the name of the Party, but reflecting the philosophies of whichever faction paid for their petition drives and subsequent campaigns.

Whether some voters might favor direct voting, or instead favor the views endorsed through a caucus system, is beside the point. Each general election voter can decide what weight to give to the party's endorsement, and vote accordingly. If the voters are inclined toward candidates with different views than those endorsed by the parties, they can vote for such candidates—and parties can choose to adjust accordingly. But under the First Amendment, it is the Party that has a right to determine its own views in its own manner, and to endorse the candidate it believes best reflects those views.

Third, Party members and, indeed, all Utah voters, will lose the neighborhood vetting process that the caucus system gives them. See *supra* 4–8. Because SB54 allows candidates to bypass the neighborhood caucus system, it is likely to receive less and less attention over time, as both candidates and caucus-goers realize it has little effect on the ultimate nominations.

Finally, the panel decision will authorize state legislatures throughout the Tenth Circuit—and indeed, all legislatures nationwide—to do exactly what *Jones* forbids: manipulate a political party's choice of candidate to be more moderate, or more extreme, depending

on the legislature's point of view. This was SB54's self-evident purpose, and the short time since it has been implemented demonstrates that it is having that very effect. See *supra* 20–21.

By giving *legislatures* increased control over political parties, the panel's decision will give even more power to incumbents. That in turn will work to the detriment of all voters, especially those who would prefer to see more genuine political options.

* * * * *

This Court routinely grants review of decisions threatening the autonomy of political parties without waiting for the lower courts to split on the underlying legal questions. That was true not only in *Jones*,[12] but also in *Washington State Grange* v. *Washington State Republican Party*,[13] *Clingman* v. *Beaver*,[14] and other, older cases.[15] Thus, even setting aside the Tenth Circuit's departure from *Jones* and its misapplication of the *White* dicta, the question presented here is "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10.

For all these reasons, certiorari should be granted on the first question.

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[12] Petition for Writ of Certiorari, *California Democratic Party* v. *Jones*, No. 99-401 (not alleging split), *cert granted*, 528 U.S. 1133 (2000).

[13] Petitions for Writs of Certiorari, *Washington State Grange* v. *Washington State Republican Party*, Nos. 06-713, 06-730 (not alleging split), *cert granted*, 549 U.S. 1251.

[14] Petition for Writ of Certiorari, *Clingman* v. *Beaver*, No. 05-307 (not alleging split), *cert granted*, 542 U.S. 965.

[15] See, *e.g.*, Petition for Writ of Certiorari, *Terry* v. *Adams*, No. 52 (1952) (not alleging square split), *cert granted*. 344 U.S. 883.

II. The majority's holding on the proper methodology for determining First Amendment burdens warrants review.

The opinion below (at Pet 23a) also holds that, because the Party wishes to have hundreds of thousands of Utahns as members, the Party's *own* views—as determined through procedures established by the Party's governing documents—are irrelevant to whether the Party has suffered a First Amendment burden. As Judge Tymkovich concluded, this holding likewise merits this Court's review. Pet. 100a ("I write separately to note the *issues* raised here deserve the Supreme Court's attention.") (concurring in denial of rehearing *en banc*).

A. The majority violated decisions of this Court in rejecting the independent associational rights of political parties and, by extension, other expressive associations.

The Tenth Circuit majority claimed that, because the Party's *members* could vote in the primary, "the associational rights of the *party* are not severely burdened" by SB54. Pet. 23a (emphasis added). Putting aside the error in sweeping up in its classification of "party leadership" thousands of ordinary Party delegates elected by tens of thousands of Utahns at neighborhood caucus meetings, the majority's conclusion violates several decisions of this Court.

1. As Judge Tymkovich explained (Pet. 73a), the majority's holding on this question is foreclosed by the holding in *Eu* v. *S.F. City Democratic Central Committee* that "[f]reedom of association … encompasses a political party's decisions about the identity of, *and the process for electing*, its leaders." 489 U.S. 214, 228, 230

(1989) (emphasis added). The same reasoning, obviously, extends to the party's choice of candidates. And this Court's emphasis on the party's "process for electing" its leaders and representatives establishes that the party itself has First Amendment rights, apart from those of its members. It follows that the First Amendment "burden" imposed by a law regulating that process, directly or indirectly, must be determined with reference to the party itself, independent of any impact the law might have on members. See Pet. 73a (Tymkovich, dissenting).

Jones likewise protects the right of a political party, as an *institution*, in not having its message or its endorsement of a standard-bearer changed. 530 U.S. at 571, 582. Indeed, *Jones* squarely held that government action that changes a party's message by forced association is a heavy "burden on [the] political *party's* associational freedom." *Id.* (emphasis added). Unlike the majority below, this Court didn't limit its "burden" analysis to party members, much less treat party members as equivalent to the party itself.

The recent four-Justice concurrence in *Gill* v. *Whitford* also shows that the rights of political parties are separate from the rights of party members. Quoting Justice Kennedy, Justice Kagan explained that "significant First Amendment concerns arise" when a State purposely "subject[s] a group of voters *or their party* to disfavored treatment." *Id.* (quoting *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment) (emphasis added; internal quotation marks omitted)). The concurrence went on to clarify that state-created burdens that are "true [burdens] for party members may be doubly [so] for party officials and triply [so] for the party itself * * *." *Id.*

Just like *Eu* and *Jones*, the *Gill* concurrence forecloses the Tenth Circuit's rule: The mere fact that Party *members* supposedly were not burdened because they could still vote for Republican candidates does not imply that the Party itself was not severely burdened by SB54. The Tenth Circuit's opinion thus conflicts in principle with multiple decisions of this Court on this crucial question, and hence warrants review.

2. The Tenth Circuit's "burden analysis" is also contrary to *Boy Scouts of America* v, *Dale,* which involved the Boy Scouts' policy of opposing same-sex intimacy on the part of local leaders. 530 U.S. 650 (2000). There this Court rejected the lower court's assertion that, to suffer severe First Amendment harm, the Scouting organization must proselytize its view to its members. *Id.* at 690–692, 698 (2000). Instead, recognizing that some members disagreed with the policy, the Court noted that "the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'" *Id.* at 655. Instead the Court declared: "The Boy Scouts takes an official position *** and that is sufficient for First Amendment purposes." *Id.*

In *Dale,* moreover, that "official position" was determined, not by the latest popular vote of the association's rank and file, but by the organization itself, acting pursuant to its governing documents. *Id.* at 651–653. And denying the organization its ability to implement that position, the Court held, was a severe burden on the organization's First Amendment rights. *Id.* at 659.

Here, the Tenth Circuit majority ignored *Dale* in favor of the very populist view that decision rejected.

Instead, the panel concluded (Pet.22a) that requiring the Party to violate its own views on representative government is no burden on the Party, because the replacement system is a popular vote. But that is a flat violation of the principle applied in *Dale* as well as the other decisions cited above.

3. The institutional freedom recognized in these decisions has strong roots in the history of the First Amendment. For example, in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, this Court noted that a fundamental reason for the First Amendment's adoption was to protect "the freedom of religious groups to select their own" leaders and, by implication, the process for selecting them. 565 U.S. 171, 184 (2012). Moreover, as Justice Alito, joined by Justice Kagan, observed in *Hosanna-Tabor*, this freedom, while especially strong for religious groups, extends to *all* expressive associations. See *id.* at 200.

4. The panel opinion turns both history and precedent on their heads. Rather than deferring to the Party's method for selecting candidates, or even recognizing the Party's own First Amendment burdens, the panel authorizes the *government* to dictate how the Party's candidates will be selected. Accordingly, as Judge Tymkovich explained (at Pet. 65a), "the new procedures [mandated by SB54] transform the Party from a tight-knit community that chooses candidates deliberatively to a loosely affiliated collection of individuals." Thus, the Party loses "control over the *selection* of those who will personify its beliefs." *Hosanna-Tabor* 565 U.S. at 188 (emphasis added) (church autonomy case). It is hard to imagine a more severe burden on an organization's First Amendment rights—

whether or not rank-and-file members are also burdened.

Here, moreover, the organization's beliefs include the political view—codified in the Party's documents—that neighborhood political participation is preferable to retail electioneering as a method for selecting which candidates will earn the Party's endorsement. Even if some Party members may prefer direct elections, that preference cannot defeat the Party's own constitutional interests. And by forcing the Party's own chosen candidate to compete against candidates who disagree with the Party's caucus-convention system, the majority is pitting the Party against itself.

The majority responded (at Pet. 21a n.8) that, under *Jones*, the Party has a First Amendment right only to *endorse* candidates. But that is precisely what selection of a party's *candidate* does – it identifies which candidate is endorsed by the party. Unlike a non-partisan primary that does not purport to identify a "party's" chosen candidate, Utah has a partisan primary, and the emerging candidates are indeed those claiming to represent the party qua party.

In short, there can be no doubt that, as Judge Tymkovich emphasized, the majority departed from this Court's precedents in conflating the interests of the Party with those of its members. For that reason alone, the majority's decision merits this Court's review.

B. The question merits review because of its devastating practical implications for parties and other expressive associations.

The panel's opinion also warrants review because of its sweeping practical consequences: It effectively authorizes governments to change the election processes of not only political parties, but most expressive associations.

1. As explained above, the decision below holds that a political party is not burdened by state pressure to make certain choices so long as the lay membership is deemed likely to favor the ultimate outcome. This implies that governmental interference in internal Party choices—whether to hold caucuses, how to hold elections, or even what platform to maintain—do not burden the Party as an institution so long as lay members have the ultimate decision via some form of popular decision making.

But a political party is typically governed by representatives just like our nation is. And it is startling to suggest that the First Amendment does not protect a party's chosen structure of decision-making simply because it is "republican" in form rather than directly populist. Cf., *e.g.,* U.S. Const. Art. II, § 1 (electoral college). The Tenth Circuit's ruling thus jeopardizes any indirect decision-making process or delegate system, including the super-delegate process that the national Democratic Party has long used to nominate Presidential candidates.

Armed with the decision below, moreover, legislatures in the Tenth Circuit and elsewhere could try to punish political parties by forcing internal (or external) choices to be voted on by the party's membership.

Not only would this burden any party so affected, it would also burden the party's members, many of whom have likely joined the party in part because of its pre-existing decision-making apparatus.

2. The same analytical errors that endanger political parties endanger all expressive associations. For example, nothing in the panel opinion suggests any reason why the Tenth Circuit's "burden" analysis would not equally apply to the Boy Scouts, the Sierra Club, or any other private association with members or stakeholders. Under the Tenth Circuit's legal theory, a state could authorize the lay membership to elect the Sierra Club's President directly, without "burdening" the Club itself. Or it could authorize parents to hire a private school's teachers without "burdening" the school's views, as expressed through its governing documents.

To be sure, in a footnote added at the rehearing stage, the majority disclaimed any intention to "address the reach of governmental power to regulate other associational nominating decisions." Pet. 51a n.29. But this is cold comfort: The same First Amendment principles protecting the associational autonomy of political parties also apply to other expressive organizations. And although it might be possible to cabin the majority's analysis of governmental *interests* to political parties, the majority's First Amendment "burden" analysis would logically apply to all expressive organizations.

Moreover, manipulation of a political party's campaign-related associations and expression is among the heaviest of First Amendment burdens. As the Court put it in *Eu,* "[T]he First Amendment has its fullest and most urgent application to speech uttered

during a campaign for political office." *Eu*, 489 U.S. at 223 (internal quotation marks omitted). Given that the panel endorsed the viewpoint-based manipulation of core campaign-related speech and association, in part by conflating the interests of the Party with those of its members, other associational entities would be unlikely to prevail on the "burden" issue if the majority's approach stands.

3. As Judge Tymkovich pointed out (at Pet.65a), these consequences would logically extend even to churches and other religious organizations, as the same freedom of association applies to them as other institutions. To be sure, the Free Exercise and Establishment Clauses provide additional protections for religious organizations. But a court could easily sidestep these protections under current precedent:

- Because the Free Exercise Clause likewise requires an entity to be "substantially burdened,"[16] a court relying on the Tenth Circuit's decision could view that burden in terms of its effect on adherents, rather than on the organization itself. It could therefore uphold a law shifting any number of decisions from a religious organization to a popular vote of that organization's members, without finding any "burden" on the organization itself.
- Likewise, if a law were neutral and generally applicable—that is, applied to all non-profit entities—a court under a common interpretation

[16] *E.g. Employment Div.* v. *Smith*, 494 U.S. 872, 883 (1990) (summarizing case law); see also 42 U.S.C. 2000bb-1 (statutory protection providing the same requirement).

> of present precedent could rule that the Free Exercise Clause doesn't protect churches from such a law any more than other associations.[17]

While this Court may someday clarify the scope of the Religion Clauses to foreclose such arguments, the Court has not yet done so.[18] Thus, with the precedent cited above, the Tenth Circuit's decision arguably enables legislatures to force alterations to the decision-making processes of churches and other religious organizations.

In short, on the second question presented, the panel's decision not only conflicts in principle with numerous decisions of this Court, it opens the door to governments imposing severe burdens on political parties and all expressive organizations. Review is warranted on this question as well.

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[17] *Smith*, 494 U.S. at 887–890.

[18] See, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting) (noting need for additional briefing and argument on neutral and generally applicable rule).

CONCLUSION

The majority's decision is a major threat to an important First Amendment freedom that this Court has long recognized in a variety of contexts, namely, the right of a political party—or any other expressive association—to choose for itself "the process by which [it] selects a standard bearer." *Jones,* 530 U.S. at 575. But the majority's decision also gives this Court a good opportunity to resolve manifest confusion—in the Tenth Circuit and elsewhere—about the proper scope of that vital freedom.

The petition should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals for the Tenth Circuit

Utah Republican Party and Utah Democratic Party
v. SPENCER J. COX, in his official capacity as Lieutenant Governor of Utah,

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Nos. 16-4091/16-4098

Appeal from the United States District Court for the District of Utah
(D.C. No. 2:16-CV-00038-DN)

Marcus Mumford, Mumford Law, Salt Lake City, Utah, for Plaintiff-Appellant.

David P. Billings, Fabian VanCott, Salt Lake City, Utah (Peter W. Billings and Charles A. Stormont, Fabian VanCott, Salt Lake City, Utah, and Clemens A. Landau, Zimmerman Jones Booher, Salt Lake City, Utah, with him on the briefs), for Plaintiff - Intervenor-Appellant.

Tyler R. Green (Stanford E. Purser with him on the brief), Utah Attorney General's Office, Salt Lake City, Utah, for Defendant-Appellee.

Before **TYMKOVICH**, Chief Judge, **EBEL**, and **LUCERO**, Circuit Judges.

EBEL, Circuit Judge.

These appeals are only the most recent volley in the spate of litigation that has dogged the Utah Elections Amendments Act of 2014, commonly known as SB54, since it was signed into law in March 2014. At issue here, SB54 reorganized the process for qualifying for a primary ballot in Utah, most importantly by providing an alternative signature-gathering path to the primary election ballot for candidates who are unable or unwilling to gain approval from the central party nominating conventions. Prior to the passage of SB54, the Utah Republican Party ("URP") selected its candidates for primary elections exclusively through its state nominating convention, and it would prefer to continue to do so.

In this litigation, the URP sued Utah Lieutenant Governor Spencer Cox in his official capacity ("the State")[1], alleging that two aspects of SB54 violate the URP's freedom of association under the First Amendment, as applied to the States by the Fourteenth Amendment. The two challenged sections (1) require parties to allow candidates to qualify for the primary ballot through either the nominating convention or by gathering signatures, or both (the "Either or Both Provision"); and (2) require candidates pursuing the primary ballot in State

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[1] In Utah, the Lieutenant Governor administers the state election process.

House and State Senate elections through a signature gathering method to collect a set number of signatures (the "Signature Requirement"). In two separate orders, the United States District Court for the District of Utah balanced the URP's First Amendment right of association against the State's interest in managing and regulating elections, and rejected the URP's claims. Re-conducting that balancing de novo on appeal, we AFFIRM.

I. BACKGROUND

According to its constitution and bylaws, the URP's process for nominating a candidate to the general election proceeds along a singular path. Candidates present their candidacy to the delegates at the party convention, and the delegates then caucus for nominees for each office. If a single candidate achieves over 60% of the caucus vote, that candidate is certified to the state for placement on the general election ballot, and no primary is held. If no candidate receives 60% of the convention vote, the top two candidates proceed to a state-administered primary election involving only URP members. The winner of that primary election is then certified to the state for placement on the general election ballot.

In 2014, the Utah Legislature—comprised of overwhelming Republican majorities in both the State House and State Senate—passed SB54, which addressed this process. Specifically, SB54 created two types of political parties: Registered Political Parties ("RPPs") and Qualified Political Parties ("QPPs"). Both RPPs and QPPs are eligible to have the name of the party printed next to their candidates on the general election ballot, Utah Code 20A-6-301(1)(d);

the only significant difference being how each is permitted to qualify candidates for its primary election. Members of RPPs who wish to participate in a primary election may do so *only* by gathering the signatures of 2% of the eligible primary voters for the office sought. Utah Code 20A-9-403(3)(a).

If a party chooses to register as a QPP, however, it may still hold a caucus, and may certify the winners of the caucus to the primary ballot as before. See generally Utah Code 20A-9-406 *et seq*. But unlike under the previous system, a party may not restrict access to the primary ballot just to candidates who emerge from the party convention. Under SB54, a candidate who is unwilling or unable to gain placement on the primary ballot through the caucus and convention may still qualify for the primary by gathering a set number of signatures by petition from eligible primary voters.[2] Specifically, SB54 provides that in order to qualify as a QPP the party must allow its members "to seek the registered political party's nomination for any elective office by the member choosing to seek the nomination by *either or both* of the following methods: (i) seeking the nomination through the registered political party's convention process . . . or (ii) seeking the nomination by collecting

[2] For the State House and State Senate these numbers are 1,000 and 2,000 respectively. Utah Code 20A-9-408(8)(ii–iii) (the "Signature Requirement"). Those are the only two offices for which the Signature Requirement's constitutionality is at issue in this appeal. By contrast, the Either or Both provision, the constitutionality of which we also address in this appeal, applies to more than these two offices, and our consideration of that provision applies equally to all candidates and offices covered by SB54.

signatures[.]" Utah Code 20A-9-101(12)(c) ("the Either or Both Provision") (emphasis added).

It is clear from our review of the record that this "two-path" system was a compromise crafted between Utah legislators hoping to preserve the URP's caucus system and outside interests pushing a pure primary system. The end result was that a QPP's primary ballot can now include both candidates who qualified through the caucus and candidates who qualified by gathering signatures. Utah Code 20A-9-408. As originally passed, it also required parties to allow unaffiliated voters to participate in their primary elections (the "Unaffiliated Voter Provision"), but that provision was later invalidated and is not before us.

II. PROCEDURE AND JURISDICTION

a. The First Lawsuit

SB54 was signed into law on March 10, 2014, and the URP filed suit later that year seeking an injunction and declaratory judgment that the law was unconstitutional as applied to the URP (the "First Lawsuit"). The Constitutional Party of Utah ("CPU") joined the First Lawsuit, challenging the Signature Requirement in particular.

In the First Lawsuit, the district court denied the URP and the CPU a preliminary injunction, ruling that none of the alleged constitutional burdens were severe save for the Unaffiliated Voter Provision, which was not yet ripe for review. *Utah Republican Party* v. *Herbert*, 133 F. Supp. 3d 1337 (D. Utah 2015) ("*URP I*"). Once the URP notified the state that it intended to become a QPP, that issue ripened and the district court granted the URP summary judgment

invalidating the Unaffiliated Voter Provision. *Utah Republican Party* v. *Herbert*, 144 F. Supp. 3d 1263, 1278–1282 (D. Utah 2015) ("*URP II*").

In doing so, the court held that the Unaffiliated Voter Provision imposed a severe burden on the URP's associational rights and the State had no compelling interest to justify that burden. *Id.* The practical effect of the First Lawsuit, then, was to invalidate SB54's Unaffiliated Voter Provision, see *id.*, while upholding the Signature Requirement, the Either or Both Provision, and all other aspects of SB54, see *ibid.*; *URP I*, 133 F. Supp. 3d 1337. The rulings in the First Lawsuit are not before us on appeal.[3]

b. The Second Lawsuit

After the First Lawsuit, the URP announced that it would permit nomination only by caucus. The URP's justification for doing so was that it interpreted the Either or Both Provision as offering the *political party* (rather than the candidates) the option to allow nomination by either the signature gathering method, or the convention method, or both. The Lieutenant Governor responded that it was the State's position that under SB54 it is the party *member's* choice, not the party's, whether to pursue the nomination using the signature gathering method, the convention method, or both.

[3] The first lawsuit is, however, relevant to the present appeal in part because the URP argues the State took positions during that lawsuit that it should be judicially estopped from retracting in this action.

Following this interpretation by the Lieutenant Governor, the URP filed this suit in the United States District Court for the District of Utah seeking declaratory and injunctive relief that SB54 was unconstitutional. The phrasing of its Complaint was similar to the Complaint filed in the First Lawsuit. See *Utah Republican Party* v. *Cox*, 177 F. Supp. 3d 1343, 1354 (D. Utah 2016) ("*URP III*") (noting similarities). The party reiterated its argument that SB54 violated its freedom of association under the First and Fourteenth Amendments, and added a claim that the State should be judicially estopped from advancing an interpretation of the Either or Both Provision that differed from the one it advanced in the First Lawsuit. Shortly thereafter the Utah Democratic Party ("UDP") intervened as co-plaintiff to defend against the possibility that portions of SB54 would apply to one political party but not the other, and to complain that the URP's bylaws and constitution violated SB54.

In February of 2016, the district court certified two questions of state law to the Utah Supreme Court. The first requested that court's interpretation of the Either or Both Provision, asking whether that provision meant the candidate member or the party had the right to choose which—or both—of the qualification processes to use. See *Utah Republican Party* v. *Cox*, 178 F. Supp. 3d 1150, 1165 (D. Utah 2016) ("*URP IV*") (discussing certification). The Utah Supreme Court replied that the Either or Both Provision allows the candidate member, not the party, to select which of those two paths to follow in an effort to be certified to the primary ballot. *Utah Republican Party* v. *Cox*, 373 P.3d 1286, 1287 (Utah

2016). The second question, certified at the request of the UDP, was what would happen if a party elects to become a QPP under Utah law, but fails to comply with the requirements of that status. *URP IV*, 178 F. Supp. 3d at 1166. The Utah Supreme Court declined to answer the second question, finding it not ripe for review because it was not yet clear whether the URP was going to comply with SB54. *Cox*, 373 P.3d at 1288.

While waiting for those answers from the Utah Supreme Court, the UDP and the State filed motions in federal court for judgment on the pleadings, and the URP filed for partial summary judgment on its claims relating to the Signature Requirement. On April 6, 2016, the district court ruled that (1) the URP's claims were not barred by claim preclusion, issue preclusion, or claim splitting, (2) the State should not be judicially estopped from advancing its interpretation of the Either or Both Provision, and (3) the Signature Requirement was valid because it did not present a severe burden to the URP. *URP III*, 177 F. Supp. 3d at 1356, 1362, 1365. The district court granted summary judgment for the State on the judicial estoppel issue and also as to the signature requirements pursuant to Federal Rule of Civil Procedure 56(f). *Ibid.*

After the Utah Supreme Court answered the certified questions, the district court ruled on the remaining issues relating to the Either or Both Provision. It first held that the URP was not precluded from challenging the constitutionality of the Either or Both Provision, *URP IV*, 178 F. Supp. 3d at 1170, and that the Either or Both Provision—as interpreted by the Utah Supreme Court—did not infringe on the URP's First Amendment right of

association, *id.* at 1179. Finally, the court rejected the URP's claim that SB54 was the result of impermissible viewpoint discrimination, and then the court granted summary judgment for the State. *Id.* at 1187.

URP timely appealed the district court's grant of summary judgment. The UDP subsequently cross-appealed, challenging the district court's denial of judgment on the pleadings based on assertions of claim preclusion, issue preclusion, and claim splitting, and also the portions of the district court's opinion which purport to invalidate the URP's bylaws and constitution to the extent those provisions conflict with SB54. We consolidated the related appeals, and exercise jurisdiction under 28 U.S.C. 1291.[4]

III. DISCUSSION

On appeal, this case presents two primary issues. First, the URP challenges the district court's decision to uphold the Either or Both Provision as a constitutional electoral regulation. Second, URP argues that the district court erred in concluding that the number of signatures required in the Signature Requirements for State House and State Senate are not unconstitutionally burdensome. The district court granted summary judgment for the State and against the URP on both these issues pursuant to Rule 56(f).

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[4] Upon initial review it was unclear whether all claims before the district court had been adjudicated to finality. See 28 U.S.C. 1291 (restricting appellate review to "final" decisions from the district court). After we received supplemental briefing, it became clear to us that all issues had been ruled upon, dismissed as moot, or mooted by the district court's rulings, so there was a final decision below.

See *URP III*, 177 F. Supp. 3d at 1371 (awarding summary judgment against the URP on the signature requirements under Fed. R. Civ. P. 56(f)); *URP IV*, 178 F. Supp. 3d at 1188 (awarding summary judgment against the URP on the Either or Both Provision under Fed. R. Civ. P. 56(f)). On appeal we also address claims raised by the UDP and the conduct of URP counsel Marcus Mumford.

"We review the district court's summary judgment de novo, applying the same standard as the district court," and drawing all reasonable inferences in the light most favorable to the non-moving party. *Ellis* v. *J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1191–1192 (10th Cir. 2015) (internal citations and quotations omitted). After careful review of the Record and the pleadings, we now AFFIRM the district court's grant of summary judgement for the Lieutenant Governor on both the Either or Both Provision and the Signature Requirements, conclude that the UDP's claims are not ripe for review, and decline to pursue sanctions against Mr. Mumford. Each issue is addressed below.

a. The Either or Both Provision

Under SB54, a political party that chooses to register as a QPP, and is therefore eligible to maintain its caucus system, must alternatively allow its members the option to "seek the . . . party's nomination for any elective office by the member choosing to seek the nomination by *either or both* of the following methods: (i) seeking the nomination through the [the party's] convention process . . . (ii) seeking the nomination by collecting signatures . . ." Utah Code 20A-9-101(12)(c) (emphasis added); see

also *Cox*, 373 P.3d at 1287 (Utah 2016) (interpreting that provision to offer the member, rather than the party, the choice). On appeal, the URP argues that this provision is an unconstitutional burden on its freedom of association under the First and Fourteenth Amendments. Aplt. Br. at 32–33 (citing *N.Y. State Bd. of Elections* v. *Lopez Torres*, 552 U.S. 196, 202–203 (2008)).

"It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992) (quoting *Ill. Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979). Access to the ballot and the ballot box is the necessary catalyst in the carefully calibrated system of individual freedoms and separation of powers crafted by our founding fathers. Accordingly, we take great care to scrutinize any electoral regulation that would appear to restrict this access.

"It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute," *Burdick*, 504 U.S. at 433 (citing *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 193 (1986)), or that a state may not pass reasonable, nondiscriminatory electoral regulations. The Constitution grants states the right to prescribe "[t]he Times, Places and Manner of Holding Elections for Senators and Representatives," Art I, § 4, cl. 1, and the Supreme Court has held that states enjoy similar authority to regulate their own elections, see, e.g., *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 217 (1986). The Court has further recognized that "as a practical matter, there must be a substantial regulation of elections if they

are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer* v. *Brown*, 415 U.S. 724, 730 (1974).

These regulations, however, whether they prescribe the time, place, and manner of elections or otherwise provide for orderly selection of the people's representatives, will invariably impose some burden upon individual voters and political parties. See *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 (1983). For example, even a state's decision to close its polls at 7:00 PM instead of 8:00 PM will invariably burden some voters—and therefore their respective parties—for whom the earlier time is inconvenient; so too, however, if the state chose 8:00 PM instead of 9:00 PM. These burdens, then, must necessarily accommodate a state's legitimate interest in providing order, stability, and legitimacy to the electoral process. See *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("[I]t is also clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.") (internal citations omitted).

Amidst this confluence of interests and burdens we analyze electoral regulations using the now-familiar *Anderson-Burdick* balancing test. Under *Anderson-Burdick*,

> a court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against the 'precise interests put

> forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'

Burdick, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). If, a regulation is found to impose "severe burdens" on a party's associational rights, it must be "narrowly tailored to serve a compelling state interest." *Clingman* v. *Beaver*, 544 U.S. 581, 586 (2005) (citing *Timmons*, 520 U.S. at 358). "However, when regulations impose lesser burdens, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" *Clingman*, 544 U.S. at 586-587 (quoting *Timmons*, 520 U.S. at 358).

The Party's Burdens

This case addresses Utah's electoral regulations contained in SB54 that target the method by which a QPP selects its nominee to appear on the general election ballot for state and federal offices. In this process both the political party and the state have legitimate constitutional interests that need to be balanced. While states play an important role in "structuring and monitoring the election process, including primaries," the political parties also have a First Amendment Right of Association that has to be balanced against the state's interests. *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 572 (2000). It is through primary elections that a "party's positions on the most significant public policy issues of the day" are often determined, and it is a party's "nominee who becomes the party's ambassador to the

general electorate in winning it over to the party's views." *Id.* at 575. The URP argues that SB54 infringes on its First Amendment associational rights by forcing it to adopt a candidate-selection process different from that which it would prefer. However, the Supreme Court has recognized that when political parties become involved in a state-administered primary election, the state acquires a legitimate interest in regulating the manner in which that election unfolds—subject only to the same interest-balancing that occurs throughout the Court's electoral jurisprudence.

The distinction between wholly internal aspects of party administration on one hand and participation in state-run, state-financed elections on the other is at the heart of this case. When a party selects its platform, its Chairman, or even whom it will endorse in the upcoming election, the state generally has no more interest in these internal activities than in the administration of the local Elks lodge or bar association. But when the party's actions turn outwards to the actual nomination and election of an individual who will swear an oath not to protect the Party, but instead to the Constitution, and when the individual ultimately elected has the responsibility to represent all the residents in his or her district, the state acquires a manifest interest in that activity, and the party's interest in such activity must share the stage with the state's manifest interest. The dissent blurs this distinction between the party's internal and external activity.[5]

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[5] See Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 107, 107 n.323 (2004) ("[C]ourts

The Supreme Court's jurisprudence has consistently reflected this difference between a party's internal mechanisms and its external manifestations.

> A political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform. These rights are circumscribed, however, when the State gives the party a role in the election process—as New York has done here by giving certain parties the right to have their candidates appear with party endorsement on the general-election ballot. Then . . . the State acquires a legitimate governmental interest in ensuring the fairness of the party's nominating process, enabling it to prescribe what that process must be.

N.Y. State Bd. of Elections v. *Lopez Torres*, 552 U.S. 196, 202–203 (2008) (internal citations omitted).

Lopez Torres may be a relatively modern case, but the Supreme Court's recognition of the state's vital regulatory role in primary elections is hardly a recent development. As early as 1941 the Supreme Court held that state-administered primary elections, as a "necessary step in the choice of candidates for election as representatives[,]" are subject to congressional and state regulation. *United States* v. *Classic*, 313 U.S.

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must engage in direct, functional analysis of the role of parties and primaries in American democracy. That analysis is not furthered by reasoning analogically from the Jaycees, the Boy Scouts, the Mormons, or similar religious or civil-society entities.").

299, 319–320 (1941). As our country grappled with the scourge of racial and economic discrimination at the ballot box, the Supreme Court consistently intervened in the so-called "White Primary Cases" to recognize that primary elections—or even pre-primary party activity that restricted access to the primary ballot—were sufficiently "state action" to trigger application of the Reconstruction Amendments. See *Terry* v. *Adams*, 345 U.S. 461, 469–470 (1953); *Smith* v. *Allwright*, 321 U.S. 649, 663–664 (1944).

To be sure, the "White Primary" cases do not stand for the proposition that the "processes by which political parties select their nominees are . . .wholly public affairs that States may regulate freely." *Jones*, 530 U.S. at 572–573. Nor do we suggest that a party's decision to restrict its primary to only convention delegates via the caucus approach is anywhere near the overt discrimination at issue in those cases. Rather our consideration of those cases extends only insomuch as they indicate that a party's external activities in selecting candidates for *public* office must necessarily be subject to greater state involvement and scrutiny than its wholly internal machinations.[6]

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[6] To use the dissent's example, the process by which parishioners choose their priest has no external application. See Dissent at 16. A priest does not appear on a state-run, state-financed ballot, and if a priest is successful in an election his duty is to his parish and his faith, not the broader citizenry of the state or district. The state has no interest, then, in the process by which that priest is chosen. But the URP is not a parish or a club, but rather a political association whose activities run the gamut from purely internal—such as voting on the party platform—to a hybrid internal-external—such as nominating candidates who will appear on the general election ballot in the hopes of being

In recognition of the state's role in ensuring a democratic and fair primary election the Supreme Court has called it "too plain for argument . . . that the State may . . . insist that intraparty competition be settled before the general election by primary election or by party convention." *Am. Party of Tex.* v. *White*, 415 U.S. 767, 781 (1974). Then, in 2000, the Court elaborated further, ruling that "a state may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *Jones*, 530 U.S. at 572 (citing *White*, 415 U.S. at 781). All told, by the time *Lopez Torres* arrived in 2008, the Court considered the issue settled, mentioning in passing: "To be sure, we have . . . permitted States to set their faces against 'party bosses' by requiring party-candidate selection through processes more favorable to insurgents, such as primaries." 552 U.S. at 205.

We recognize that each of these statements, while instructive, is technically dicta, but it appears to be clearly established dicta. See *Jones*, 530 U.S. at 594 (Stevens, J., dissenting) ("I think it clear—though the point has never been decided by this Court—'that a State may require parties to use the primary format for selecting their nominees.'") (quoting majority). We are "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta are recent and not enfeebled by later

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elected to represent not the URP, but the broader citizenry of Utah. The entire point of the Supreme Court's jurisprudence in this area is to recognize that the state's ability to regulate the association is not the same in the second instance as it is in the first.

statements." *Gaylor* v. *United States*, 74 F.3d 214, 217 (10th Cir. 1996) (internal citations omitted). This principle is especially relevant where, as here, the dicta has been explicitly reaffirmed several times, across multiple different eras, by Justices both in support and in dissent. See *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 237 (1986) (Scalia, J., dissenting) (basing argument on "the validity of the state-imposed primary requirement" because the Supreme Court has "hitherto considered [that validity] 'too plain for argument'"). Finally, if we were hesitant to follow this dicta, we could perhaps be persuaded by our own circuit having favorably cited—without relying—on this very language as early as 1988. See *Rainbow Coal. of Okla.* v. *Okla. State Election Bd.*, 844 F.2d 740, 745 n.7 (10th Cir. 1988) (noting that "the Supreme Court has pointed out 'that the State may . . . insist that intraparty competition be settled before the general election by primary election or by party convention'").[7] In short,

[7] We are hardly alone in recognizing the weight of this dicta. See, e.g., *Alaskan Indep. Party* v. *Alaska*, 545 F.3d 1173, 1178 (9th Cir. 2008) (relying on this dicta to uphold a primary scheme similar to the one at issue here); *Cool Moose Party* v. *Rhode Island*, 183 F.3d 80, 83 n.4 (1st Cir. 1999) (suggesting based on *White* that a mandatory primary is constitutional); *Lightfoot* v. *Eu*, 964 F.2d 865, 872 (9th Cir. 1992) (upholding a mandatory primary in part based on dicta from *White*); *Az. Green Party* v. *Bennett*, 20 F. Supp. 3d 740, 748 (D. Ariz. 2014) (citing favorably to *Jones* to establish that a party could not insist on using a nominating convention to avoid a burdensome state law); *Greenville Cty. Republican Party Exec. Comm.* v. *South Carolina*, 824 F. Supp. 2d 655, 666 n.7 (D. S.C. 2011) (relying on *White* for proposition that a state may "mandate that a single nomination method be used by all candidates and political parties").

we are unwilling to ascribe to so many jurists the contention that their reliance on this dicta was "completely assumed and unreasoned." See Dissent at 37.

Furthermore, even beyond this consistent dicta, the Supreme Court has explicitly upheld a State's ability to regulate the *scope* of a party primary. In *Clingman* v. *Beaver*, the Court considered the constitutionality of an Oklahoma law restricting the right to vote in party primary elections to voters who were registered as either independents or as members of the party. 544 U.S. at 584. There, a party that wanted to open its primary to all registered voters sued, and the Court found that the restrictive regulation only "minimally" burdened the party. *Id.* at 590. The Court so held because "Oklahoma's law does not regulate the [party's] internal processes, its authority to exclude unwanted members, or its capacity to communicate with the public." *Ibid.*

The same could be said of SB54. SB54 does not regulate the party's internal process; in fact its grand compromise was to maintain the URP's traditional caucus system as a path onto the primary ballot. Furthermore, because the First Lawsuit excised the Unaffiliated Voter Provision, the law no longer proscribes the URP's authority to exclude unwanted members from its primary. Finally, nothing in SB54 prevents the URP from endorsing the candidate of its choice and using traditional advertising channels to communicate that endorsement to the state's voters. Contra *Eu* v. *S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222–229 (1989) (invalidating a California ban on primary endorsements). In light of the Supreme Court's recent and consistent dicta, as well

as its holding in *Clingman*, we see no choice but to find the Either or Both Provision only minimally burdensome on the URP.

As a final salvo, however, the URP argues that the Either or Both Provision imposes severe burdens on its associational rights because it leaves the party vulnerable to being saddled with a nominee with whom it does not agree. See Aplt. Br. at 40. We are not so persuaded.

First and foremost, this case is not, as the dissent would suggest, about who the candidates are, but rather who the deciders are. SB54 was not designed to change the substantive candidates who emerged from the parties, but rather only to ensure that all the party members have some voice in deciding who their party's representative will be in the general election. SB54's goal was to ensure only that the will of all the URP was not being truncated by an overly restrictive and potentially unrepresentative nominating process.

Balancing the State's interests against the interests of an association requires us to define the association with the requisite specificity. Here, where the argument is that SB54 may lead to a party nominating a candidate with whom it may not agree,[8]

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[8] This is not to suggest that we disagree with the dissent's observation that "[p]olitical science literature has long observed parties have several components, only one of which is their membership." Dissent at 24. But in this context, in which the question is whether the party is being forced to associate with individuals with whom it may not agree, the Supreme Court has instructed that the relevant "Party" is the collection of party members. In *Jones*, the Supreme Court distinguishes between "party leadership['s]" ability to endorse a candidate and "party

the question before this Court is whether the burdens imposed on *the URP* by SB54 are minimal or severe. See Aplt. Br. at 31 (defining the first step of the *Anderson-Burdick* test as whether the law burdens a "political party's constitutional rights."). Put another way, our task today is to analyze SB54's burdens on the Utah Republican Party, or, put still differently, the group of like-minded individuals in Utah who have joined together under the banner of the Republican Party—rather than just the leadership of the party.

The URP, like all political parties, has "a right to identify the people who constitute the association, and to select a standard bearer who best represents the *party's* ideologies and preferences." *Eu*, 489 U.S. at 224 (internal citations and quotations omitted) (emphasis added). That is why the district court declared the Unaffiliated Voter Provision, which forced the URP to allow nonmembers to help select its candidates, unconstitutional in the First Lawsuit. *URP II*, 144 F. Supp. 3d at 1280.

But now that the Unaffiliated Voter Provision has been excised from SB54, the URP is no longer in danger of fielding a general election candidate who does not enjoy the support of at least a plurality of the

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members'" ability to choose a nominee. 530 U.S. at 580. This distinction makes clear who the *Jones* majority is referring to when it references "the party" in the final sentences of the two ensuing paragraphs: "In any event, the ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the party leadership, but do not want *the party's* choice decided by outsiders. . . . There is simply no substitute for *a party's* selecting its own candidates." *Id.* at 581 (emphasis added).

voting members of the Utah Republican Party.[9] It is true, as has happened since the passage of SB54, in fact,[10] that the eventual nominee may not enjoy the support of a plurality of the roughly 3,500 party delegates that comprise the URP's caucus electorate. But that failure does not implicate the associational rights of the *party*, which consists of the roughly 600,000 registered Republicans in Utah, and which is not limited to the party-convention delegates.

The party leaders and convention delegates are still free to communicate to the rest of their party which of the candidates on the primary ballot the

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[9] The Court is aware that under the new process, unlike under the old—in which no more than two candidates could advance from the URP convention to the primary ballot—the URP's general election candidate could potentially receive a plurality, rather than a majority, of votes in the primary election. The Court recognizes the party's interest in avoiding this outcome. However, while this interest was mentioned at Oral Argument, it was not included in the argument section of the URP's brief, and we "routinely have declined to consider arguments that are not raised, or are inadequately presented in an appellant's opening brief." *Bronson* v. *Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007). Furthermore, even if we do consider this newly advanced interest, we find that, in light of this country's historic recognition of the legitimacy of plurality-based elections, the additional burden this imposes on the URP is, at most, minimal. Cf. *Whitcomb* v. *Chavis*, 403 U.S. 124, 160 (1971) ("[W]e are unprepared to hold that district-based elections decided by plurality vote are unconstitutional . . .").

[10] See John Verhovek, Saisha Talwar, and Adam Kelsey, Moderate mayor wins republican primary to replace Rep. Chaffetz in Utah, ABCNews.com, Aug. 15, 2017, http://abcnews.go.com/Politics/utahs-special-election-primary/story?id=49216793.

leadership supports.[11] But if the URP wants to open its doors to roughly 600,000 people across the state of Utah, the associational rights *of the party* are not severely burdened when the will of those voters might reflect a different choice than would be made by the party leadership. To say otherwise is to erroneously conclude that the rights and interests of the association extend only to the rights and interests of the party leadership. See *Tashjian*, 479 U.S. at 215 ("A major state political party necessarily includes individuals playing a broad spectrum of roles in the organization's activities.").[12] In further support, we need only look to the Supreme Court for unambiguous direction: "To be sure, we have . . . permitted States to set their faces against 'party bosses' by requiring party-candidate selection through processes more

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[11] The URP may still communicate that information using the traditional channels of political advertising.

[12] We also note that, in its Complaint filed in this lawsuit, the URP repeatedly referred to SB54 as burdening the rights of "the Party and its members." See, e.g., Aplt. App. at 26 ("The First and Fourteenth Amendments to the United States Constitution guarantee to the Party and its members the right to associate in a political party[.] . . .These are core Constitutional freedoms held individually and collectively by the members of the Utah Republican Party, and by the Party itself.") (emphasis added). This accords with how the Supreme Court has identified the constitutional right of association as it relates to a political party. See *Norman* v. *Reed*, 502 U.S. 279, 288 (1992) ("For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. The right derives from the First and Fourteenth Amendments and advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their political preferences.").

favorable to insurgents, such as primaries." *Lopez Torres*, 552 U.S. at 205.[13]

The unambiguous import of *Lopez Torres* is that *in order to "set their faces against 'party bosses'"* states may require primary elections. See *id.* (emphasis added). This language establishes that the associational rights of a political party expand beyond the party leadership, and would be toothless if party bosses could dictate how candidates can qualify for the primary ballot, perhaps, for example, by requiring candidates to win the support of "party bosses" in order to qualify for the primary ballot, leading to primary "elections" with a single candidate on the ballot. See also *Alaskan Indep. Party* v. *Alaska*, 545 F.3d 1173, 1179–1180 (9th Cir. 2008) (noting its skepticism that a scheme similar to that at issue in

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[13] The dissent cites to *Eu*, Dissent at 25, as a case where, according to the dissent, the Supreme Court draws a distinction between the "Party" and its "members." However, that is not an accurate reading of *Eu*. It is true that in *Eu* the Court uses the phrase "the parties and their members," but that phrase is used inclusively rather than drawing a distinction between a party and its members. 489 U.S. at 232. The rights of "the Party and their members" emphasizes the unity of the Party and its members rather than attempting to draw a distinction between them. See also *Timmons*, 520 U.S. at 351.

Eu is also distinguishable in that it dealt primarily with the issue of a political party in the speech, as opposed to associational, context. Party leadership may enjoy different First Amendment speech rights than do individual members. *Jones* itself discusses this distinction. 530 U.S. at 580 ("The ability of the party leadership to endorse a candidate [speech context] is simply no substitute for the party members' ability to choose their own nominee [associational context]."). This line leaves little doubt that the scope of a political organization includes its members.

this case imposes a severe burden on a party's associational rights).

Finally, the dissent relies on *Jones*, but *Jones* is not contrary to our holding. In that case, the Supreme Court held that states could not force parties to allow non-members—"those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival"—to participate in that party's primary election. *Jones*, 530 U.S. at 577. Understandably, the Court held that such a "forced association" intruded on the party's First Amendment associational rights. *Jones*, 530 U.S. at 577; see also *Democratic Party of the U.S.* v. *Wisc. ex rel. La Follette*, 450 U.S. 107, 123–124 (1981).

But no such burden exists in this case. When SB54 was initially passed, it did contain a significant associational burden in that it forced the party to associate with unaffiliated voters. However, that issue was fought in the first lawsuit, and the URP won. Now the URP's nominee is decided only by those individuals who have chosen to associate with the Party. Following the first lawsuit, SB54 is perfectly compliant with the holding in *Jones*.

For these reasons, we conclude that SB54 does not impose a severe burden on the URP by potentially allowing the nomination of a candidate with whom the URP leadership disagrees. Therefore, in recognition of the Supreme Court's repeated and unrecanted dicta, we hold that the Either or Both

Provision is at most only a minimal burden on the URP's First Amendment associational rights.[14]

1. The State's Interests

When an electoral provision "places no heavy burden on associational rights," as we hold the Either or Both Provision does not, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Clingman* v. *Beaver*, 544 U.S. 581, 593 (2005) (quoting *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). This was the approach adopted by the district court, which upheld the Either or Both Provision relying on the State's important regulatory interests of "managing elections in a controlled manner, increasing voter participation, and increasing access to the ballot." *URP IV*, 178 F. Supp. 3d at 1179 (citing Utah Code 20A-9-401, 2-300.6).[15]

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[14] While the dissent can speculate that SB54 "interferes with the Party's internal procedures, changes the kinds of nominees the Party produces (is, in fact, meant to do so), allows unwanted candidates to obtain the Party nomination, causes divisiveness within the Party, and reduces the loyalty of candidates to the Party's policies[,]" Dissent at 21, we believe that is simply not an accurate representation of the record before us.

[15] The dissent attempts to equate the motives of an advocacy group, Count My Vote ("CMV"), with that of the Utah legislature. See, e.g., Dissent at 5, 17, 21, 32. The problem with this approach is that in discerning legislative intent we look not to the motive of advocacy groups, lobbyists, or even individual legislators, but the legislature as a whole. So let's talk about the legislature. First, a substantial majority of the members of the Utah legislature are members of the URP. Second, if we were to look to advocates rather than legislators, all indications are that CMV's goal was not to determine *who* won the URP's

nomination, but rather *how* that nominee was selected. Finally, the record reflects that the Utah legislature was motivated to preserve a representative and fair *process* rather than focusing on the specific outcome of the process.

Let's step back for a minute and reflect on what really happened. The process that led to SB54 is certainly not determinative to our outcome, but it may be informative. On one hand, the URP wanted to preserve its traditional caucus and convention system, which was susceptible to strong influence by Party leadership. On the other hand, CMV wanted a mandatory primary, which would entirely eliminate the URP's preferred system. CMV had a powerful piece of ammunition in its arsenal in that it was threatening to take its idea to the voters directly via a ballot initiative, and apparently the Republican majority in the state legislature gave credence to that possibility. Thus was born the "Grand Compromise" where both sides got something they wanted. The Party received the assurance that the nominee it selected through its preferred caucus system would appear on the primary ballot. CMV ensured that all party members had the opportunity to play a meaningful role in selecting their Party's nominee through a direct primary vote. And URP leadership still retained the ability to advise the party membership as to who they endorsed and to advertise and campaign for their preferred candidate. And who, perhaps, was the biggest winner of this compromise? It was the heart and soul of the Republican Party: its members writ large. They were given the right to ensure that they, the URP, could decide with whom they wanted to associate on the general election ballot. This compromise illustrates the best aspects of representative democracy and honors the diverse interests that make up any political subdivision or district. See Robert Gehrke, Senate advances bill that would nullify Count My Vote initiative, Salt Lake Tribune, http://archive.sltrib.com/article.php?id=57575253&itype=CMSID (Feb. 20, 2014, 6:08PM) (last visited, Feb. 28, 2018); Robert Gehrke, It's back on: Legislators, Count My Vote renew deal on election reform, Salt Lake Tribune, http://archive.sltrib.com/article.php?id=57619746&itype=CMSID (March 2, 2014, 9:44AM) (last visited, Feb. 28, 2018).

The State favorably adopted the court's reasoning on appeal, arguing that the Either or Both Provision is a "reasonable regulation furthering the important Utah interests of managing elections in a controlled manner, increasing voter participation, and increasing access to the ballot[.]" Aple's Br. at 34. Furthermore, these interests were not the creation of the district court, but were rather advanced by the State in its motion for summary judgment. Aplt. App. 629 n.91.

The Supreme Court has, in the past, accepted similar articulations of a state's interest in regulating elections. See, e.g., *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (describing the state interest generally as an interest in "protecting the integrity and reliability of the electoral process"); *Clingman*, 544 U.S. at 593–594 (identifying state interests generally as "preserv[ing] political parties" and "enhance[ing] parties' electioneering and party-building efforts"); *Timmons*, 520 U.S. at 364 ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes.").

These state interests constitute the very backbone of our constitutional scheme—the right of the people to cast a meaningful ballot. That is one of the rights through which all other rights are protected. In designing our delicate constitutional scheme the founders recognized the importance of representative democracy. They believed it was "essential to liberty that the government in general should have a common interest with the people," and they designed a system in which certain branches of government "have an immediate dependence on, and an intimate sympathy

with, the people." *The Federalist*, No. 52 (James Madison) (Terrance Ball ed., 2003).[16]

Against this backdrop, a survey of the modern political landscape and its decreasing number of truly competitive legislative districts demonstrates that this right can be impaired or even rendered meaningless if not protected at the primary level. Now, more than ever, "we cannot close our eyes to the fact . . .that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election . . . and may thus operate to deprive the voter of his constitutional right of choice." *Classic*, 313 U.S. at 319. A government that refused to acknowledge its interest in protecting representative democracy during primary elections would be ignoring its solemn obligation to preserve Madison's "sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents." *The Federalist*, No. 56 (James Madison) (Terrance Ball ed., 2003). After all, "a

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[16] See also Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 657 (2007) (explaining that "widespread participation" is a "crucial democratic value" for four reasons: (1) exposing decision-makers to new ideas and viewpoints, (2) ensuring democratic legitimacy, (3) redistributing government resources and priorities to reflect evolving problems and needs, and (4) furthering self-fulfillment and self-definition of individual citizens); Frances R. Hill, *Putting Voters First: An Essay on the Jurisprudence of Citizen Sovereignty in Federal Election Law*, 60 U. Miami L. Rev. 155, 156–57 (2006) ("The concept of consent as suggested by the first sentence of the Constitution is not limited to the single act of ratifying the Constitution, but rather is a process of continuing consent, expressed through continuing participation. Such participation is the foundation of representative government.").

dominant party's primary can determine the representative ultimately elected[,]" *LULAC* v. *Perry*, 548 U.S. 399, 487 (2006) (Breyer, J., concurring in part and dissenting in part), and "[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the major political parties] have been made." *Morse* v. *Republican Party of Va.*, 517 U.S. 186, 205–06 (1996) (plurality opinion) (internal quotations omitted) (alteration in original).

Are the voters who only participate in party primaries smarter than those who gather for a caucus or convention? Do they make better choices? Perhaps not. But it is not for us to debate the desirability of their outcomes if the voters are given a fair chance to express their preferences.

3. Balancing the Burden on the Party against the Interests of the State

How could it not be true in a representative democracy such as ours that the State has a strong—even compelling—interest in ensuring that the governed have an effective voice in the process of deciding who will govern them? On balance, then, the State interests in SB54 surely predominate over the minimal burdens imposed upon the URP.[17]

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[17] The Ninth Circuit, presented with a similar law establishing a mandatory primary at the expense of a party-nominating convention, held that the law survived even strict scrutiny because it was narrowly tailored to advance the compelling state interest of "eliminating the fraud and corruption that frequently accompanied party-run nominating conventions." *Alaskan Indep. Party* v. *Alaska*, 545 F.3d 1173, 1180 (9th Cir. 2008). We have no occasion to assess whether SB54 could similarly survive strict scrutiny, but find that case nonetheless instructive in our

Accordingly we AFFIRM the district court's holding that the Either or Both Provision is a constitutional exercise of the State's regulatory authority.[18]

B. The Signature Gathering Requirement

The URP also argues that SB54 is unconstitutional because the signature requirements for State House and State Senate are overly burdensome.[19] Given that the URP's established procedures do not involve a signature-gathering path at all, the URP's preference is clearly to have the signature-gathering path to the primary ballot eliminated all-together. Nonetheless, the crux of the URP's argument challenging this section is that the sheer number of signatures

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assessment that SB54's similar restrictions can survive much less intensive scrutiny.

[18] The URP also argues that the State should be judicially estopped from taking the position that the candidate, not the party, is able to decide whether to seek the nomination through the convention or through submitting signatures. Aplt. Br. at 48–50. Its argument is based on a colloquy between the judge and counsel for the State in the First Lawsuit. After reading the exchange, Aplt. App. 345–47, the Court is not left with the impression that the position advanced by the State in the First Lawsuit is "clearly inconsistent" with the position it advances now, see *Hansen* v. *Harper Excavating, Inc.*, 641 F.3d 1216, 1227 (10th Cir. 2011). For this reason, not to mention the URP's failure to cite to the Record in the argument section of its brief, see Fed. R. App. P. 28(a)(8)(A), we AFFIRM the district court's decision not to apply judicial estoppel.

[19] While SB54 establishes varying signature requirements to access the primary ballot for all elections, the district court only discussed the potential unconstitutionality of the requirements for two offices: State House and State Senate. URP III, 177 F. Supp. 3d 1343, 1365 (D. Utah 2016). Therefore we restrict our consideration of the signature requirements to the requirements established for those two offices.

required to access the primary ballot for these two offices is too high a barrier to entry, and thus it unconstitutionally burdens the URP's right of association. Put differently, the URP argues here that the petition requirements established in SB54 make it too difficult to qualify for the primary ballot for these offices, notwithstanding the fact that the URP would undoubtedly prefer the signature-gathering requirements be so difficult to attain that the only candidates who ever qualified for the primary were the candidates who qualified by winning the URP's caucus.

We pause briefly to note that SB54's severability clause would likely preclude us from striking down the entire law even were we to rule in favor of the URP on this issue, see Utah Code § 20A-1-103, but we nonetheless consider this argument in the alternative, and ultimately conclude that the Signature Requirements—while a burden—are not unconstitutional under the Anderson-Burdick balancing test as applied to the URP.

Any form of candidate eligibility requirement necessarily implicates basic constitutional rights, but as a practical matter "not all restrictions imposed by the States on candidates' eligibility [to appear on the] ballot impose constitutionally-suspect burdens on voters' rights to associate or to choose among candidates." Anderson, 460 U.S. at 788. As we have previously held, a "state has a legitimate interest in requiring a showing of a 'significant modicum of support' before it prints on the state election ballot the name of a political party and its slate of candidates,'" noting that such a requirement "serves the important state interest of avoiding 'confusion, deception, and

even frustration of the democratic process[.]" *Artunoff* v. *Okla. State Election Bd.*, 687 F.2d 1375, 1378 (10th Cir. 1982) (quoting *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971)). We have further recognized that there is no hard-and-fast rule as to when a restriction on ballot eligibility becomes an unconstitutional burden. See *Artnunoff*, 687 F.2d at 1379. Instead, candidate eligibility requirements are considered under the Anderson-Burdick balancing test, in which a court is to weigh the character and magnitude of the asserted injury to the plaintiff against the interests advanced by the State as justifications for the eligibility requirements. *Anderson*, 460 U.S. at 789.

Under SB54, an individual who wants to follow the signature-gathering path onto a State Senate primary ballot is required to collect 2,000 signatures of registered voters who are residents of the district and permitted by the party to vote for its candidates in a primary election. Utah Code § 20A-9-408(8)(b)(iii). For a candidate for the State House, the requirement is 1,000 signatures. Id § 20A-9-408-(8)(b)(iv). The district court stated that these requirements, considered alone, "may be unconstitutional as applied to the URP." *URP III*, 177 F. Supp. 3d at 1366 ("[T]he signature gathering requirements under Utah Code §§ 20A-9-408(8)(b)(iii) and - 408(8)(b)(iv) ... may be unconstitutional as applied to the URP."). Nonetheless, because the court found signature gathering to be only an additional way of accessing the ballot, and the other way to access the ballot—via the convention path— constitutional, the district court did not invalidate the Signature Requirement, nor did it strike down the law as a whole, relying on *LaRouche* v. *Kezer*, 990 F.2d 36 (2d Cir. 1993). URP III, 177 F. Supp. 3d at 1368.

1. *LaRouche* v. *Kezer*

In *LaRouche*, two candidates for the Democratic nomination for president challenged their inability to qualify for the Connecticut primary election ballot. *LaRouche*, 990 F.2d at 37. At issue were two Connecticut ballot-access laws. The first, the "media recognition" statute, required the Secretary of State to place on the primary ballot those candidates who are "generally and seriously recognized according to reports in the national or state news media." *Id.* (quoting Conn. Gen. Stat. § 9–465(a) (1989)). The second, the "petition alternative" statute, enabled candidates failing to gain access under the media recognition statute to appear on the ballot "if, within the next fourteen days, they collect signatures from one percent of their party's registered voters." *Id.* (citing Conn. Gen. Stat § 9–465(b), 9–467 to 469 (1989)).

The district court in that case examined the two statutes in isolation, ultimately upholding the petition alternative but ruling that the media recognition statute was void for vagueness. *LaRouche* v. *Kezer*, 787 F. Supp. 298, 304–05 (D. Conn. 1992). On appeal, the Second Circuit held that the district court had erred in analyzing each statute separately. Rather, the court held, the constitutionality of a state's ballot access provisions should be examined in light of the entirety of the state's comprehensive election code. *LaRouche*, 990 F.2d at 39 (citing *Burdick* v. *Takushi*, 304 U.S. 428, 438–39 (1992); Storer, 415 U.S. at 738–40 (1974); *Am. Party of Tex.*, 415 U.S. at 786–87). From this perspective, the court concluded that:

> if the petition alternative would be constitutional standing alone, the additional method of a media recognition test is not in any sense an unconstitutional burden. To the contrary, because it is not constitutionally required, the media recognition test, whether or not vague, increases the opportunities to get on the ballot and reduces the burdens on candidates. . . . In short, if the district court was correct about the constitutionality of the petition alternative standing alone, then the media recognition statute is a fortiori valid as an additional means of ballot access.

LaRouche, 990 F.2d at 38–39. The court did add, however, that this approach would not save a ballot qualification statute if the statute were "wholly irrational—a coin-flip test, for example[.]" *Id.* at 38 n.1. The lesson from *LaRouche*, then, is that, provided it is not wholly irrational, an otherwise unconstitutional ballot-access statute will not be struck down so long as there is an alternative, constitutional, method of accessing the ballot.

We do not in this case need to adopt this as a per se rule. We do, however, agree with the *LaRouche* court's recognition of Supreme Court precedent—not to mention our own precedent—as requiring us to analyze ballot-access opportunities in sum rather than in isolation. See, e.g., *Burdick*, 504 U.S. at 438–39 (finding a ban on write-in voting to be a limited burden "in light of the adequate ballot access afforded

under Hawaii's election code."); *Artunoff*, 687 F.2d at 1379 (holding that the constitutionality of state ballot access laws should be determined only after "due consideration is given to the practical effect of the election laws of a given state, viewed in their totality") (citing *Clements* v. *Fashing*, 457 U.S. 957 (1982)). The lesson we take from *LaRouche*, then, is that when conducting *Anderson-Burdick* balancing with regards to state ballot-access laws, due weight should be accorded to whether a challenged provision stands in isolation as the sole method for accessing the ballot, or whether candidates have alternative and constitutionally sufficient paths through which to qualify. In the latter circumstance, the burden that any one particular route to ballot access that the law places on candidates, voters, and parties is necessarily reduced.

2. SB54

Applying this approach to the Utah Election Code, we find that the Signature Requirement withstands constitutional scrutiny.

SB54 provides two methods for candidates to qualify for the primary ballot for a QPP. First, a candidate may qualify for the primary ballot at the QPP's nominating caucus. Utah Code § 20A-9-407. No party to this lawsuit challenges the constitutionality of this provision, and in fact the URP's primary assertion, as discussed above, is that this should be the *only* available method for qualifying for the Republican primary ballot. Therefore, we accept that there is at least one constitutional method of ballot access under the Utah election code.

The second method allows a candidate to gain access to the primary ballot by gathering signatures of "registered voters in the state who are permitted by the qualified political party to vote for the qualified political party's candidates in the primary election." Utah Code § 20A-9-408(8). For candidates seeking a place on the ballot for State House, the law requires the collection of 1,000 signatures. *Id.* at 20A-9-408(8)(b)(iv). For candidates seeking a place on the ballot for State Senate, the required number swells to 2,000. *Id.* 20A-9-408(8)(b)(iii).[20]

In a perfect example of why it is prudent for legislatures to use ratio requirements as opposed to absolute numbers, the burden imposed by the signature-gathering requirements varies widely from district to district. At the outset of this litigation, a candidate using the signature-gathering path to access the primary ballot for State Senate needed to collect signatures from between 6.21% of registered Republicans (in district 14) and 30.82% of registered Republicans (in district 1) depending on the district in which he or she was running. The numbers are even

[20] When it drafted these figures the Utah legislature expected the pool of available signatories to be roughly twice as large as it currently stands, thereby reducing the required percentages by approximately half. After the district court struck down the Unaffiliated Voter Provision in the First Lawsuit, howe+ver, the pool of registered voters permitted to vote in a Republican primary election—the pool of available signatories for a Republican candidate—dropped by nearly 46% statewide as unaffiliated voters were no longer eligible to sign a candidate's petition. As of November 27, 2017, there were 603,195 registered unaffiliated voters in Utah, and 715,983 registered Republicans. Utah Lieutenant Governor Elections, *Voters by Party and Status*, www.elections.utah.gov/party-and-status (last visited 11/27/2017).

starker for the State House, where a candidate was required to collect signatures from between 7.14% (in district 27) and 57.2% (in district 26) of the registered Republicans in a given district.[21] The URP argues that these numbers are so high as to severely burden its right of association with potential candidates of its party and cannot be saved as reasonably calculated to serve a compelling state interest. Aplt. Br. at 42–45.

If the signature-gathering path stood alone we would be inclined to agree. Petition requirements are a constitutional method of serving a state's "legitimate interest in requiring a showing of a 'significant modicum of support'" before adding a candidate to an election ballot, Artunoff, 687 F.2d at 1378 (quoting *Jenness*, 403 U.S. at 442), but the Supreme Court has not yet approved a requirement greater than 5% of the registered voters in a given election. See *Jenness*, 403 U.S. at 438 (upholding a statute requiring a petition signed by 5% of eligible voters in order for an independent candidate to qualify for the general election ballot). We do not hold that 5% is the outer-boundary of what can pass constitutional muster, but it is likely the limit is at least visible from there. Where, as here, the regulation requires signatures from over 50% of the eligible voters in some districts, we can conclude that the State's legitimate interest in requiring a candidate to show a "modicum" of support no longer outweighs the burden imposed on candidates, parties, and most of all, voters, at least as to those districts.

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[21] These figures are drawn from the Record as it existed when the URP filed for summary judgment on this issue on February 2, 2016. See Aplt. App. 431–435.

However, when viewing the Utah Election Code in totality, See *Artunoff*, 687 F.2d at 1379, we are not convinced that the burdens imposed by the collection of avenues Utah has created onto a primary ballot unconstitutionally burdens the URP's First Amendment right of association.[22] First, the State has a significant interest in regulating the manner in which a candidate may qualify for an election ballot.

> A state has a legitimate interest in requiring a showing of a "significant modicum of support" before it prints on the state election ballot the name of a political party and its slate of candidates. This serves the important state interest of avoiding "confusion, deception, and even frustration of the democratic process at the general election." *Jenness* v. *Fortson*, 403 U.S. 431, 442, (1971). Furthermore, the states "have important interests in protecting the integrity of their political processes from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections." *Clements* v. *Fashing*, 457 U.S. 957 (1982).

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[22] Our analysis here is confined to the question of whether the Signature Requirement constitutes an unconstitutional burden on the URP. Because the litigants are political parties and not candidates, we do not address the burdens imposed on individual candidates.

Artunoff, 687 F.2d at 1378. This interest applies with equal force to primary elections as it does to general elections. *N.Y. State Bd. of Elections* v. Lopez Torres, 552 U.S. 196, 204 (2008) ("Just as States may require persons to demonstrate a significant modicum of support before allowing them access to the general-election ballot, lest it become unmanageable, they may similarly demand a minimum degree of support for candidate access to a primary ballot.") (internal citations and quotations omitted). Therefore, for *Anderson-Burdick* balancing purposes, these "important regulatory interests" will be sufficient to uphold SB54's Signature Requirements provided the burdens imposed by those requirements are less than severe. See *Clingman*, 544 U.S. at 586–87.

While the petition requirements standing alone would undoubtedly impose a severe burden as to some districts, we cannot find them burdensome on the party within the context of the electoral scheme as a whole. First, the signature-gathering path is only one possible avenue onto the primary election ballot, and all parties to this lawsuit concede the alternative—advancing from the party's caucus—both is constitutional and would be constitutional standing alone. Therefore, from the URP's perspective, the signature-gathering provision only "increases the opportunities to get on the ballot" thereby reducing the burden placed on the URP and other political parties. See *LaRouche*, 990 F.2d at 38.

Furthermore, over an objection from the URP, which tried to establish a dispute of material fact, the district court found that notwithstanding the loftiness of these requirements, the signature gathering path remained "a realistic means of ballot access[.]" *URP*

III, 177 F. Supp. 3d at 1369; see also *id.* at n.174 ("[T]he URP recognizes that there are at least some URP candidates who have successfully met the signature requirements to obtain access to the ballot."). This also weighs in favor of finding that the burden is less than severe.

Finally, we do recognize that some of these numbers—57%, in one particular house district—are eye-popping. Yet we are struck that the enormity of these figures says more about the compartmentalization of our current political landscape than it does the validity of SB54. The 57% figure comes from House District 26 which was one of only a handful of districts in Utah—an overwhelmingly Republican state—that is packed so full of Democratic voters that Republicans did not even bother fielding a candidate there in the most recent election. In 2014 the Republicans fielded a candidate, but that candidate received just 28% of the votes, compared to 72% for the Democratic candidate.[23] According to data in the Record, in 2016 District 26 had 9,522 registered voters, just 18% of whom were registered Republicans. This in a state where 48% of the registered voters statewide were registered Republicans.

Against this backdrop, it is more likely these eye-popping numbers say more about modern political gerrymandering and segmentation than they about do the constitutionality of SB54. Whether by overt gerrymandering, a growing tendency of people to

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[23] Utah Lieutenant Governor Elections, Election Results, https://elections.utah.gov/election-resources/election-results, (last visited Nov. 27, 2017).

gravitate towards those who share their politics, or some combination of the two, the percentages imposed by the Signature Requirement in several Utah districts is so high precisely because there are so many Democrats packed into those particular districts that the URP will never actually be able to capture that seat. Where the URP has no reasonable likelihood of fielding or electing a serious candidate in those districts with high percentage requirements of petition signatures, we cannot say the URP has suffered any real injury to its constitutional right of association when it was largely redistricting decisions that caused such anomalies.[24]

When we look at the state's electoral scheme in totality, including the retention of the caucus system as a method of qualifying a candidate for the primary ballot, we conclude that the Signature Requirement does not impose a severe burden on the URP's associational rights. Therefore we hold that Utah's legitimate interest in requiring a candidate to demonstrate a minimum degree of support in terms of gathering 1,000 or 2,000 signatures on a petition before being placed on the primary ballot for the State House or State Senate is sufficient to outweigh the provision's minimal burdens on the URP. Therefore we AFFIRM the district court's ruling that the

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[24] Nonetheless, this lawsuit demonstrates why states would be prudent to use percentages, rather than absolute totals, when requiring candidates to obtain signatures in order to qualify for the ballot. That way, as voter populations ebb and flow and partisan compositions change district-by-district, the amount of support necessary to demonstrate viability remains the same. This is the traditional method, and one we strongly encourage states to adopt moving forward.

challenged Signature Requirements do not constitute an unconstitutional burden on the URP.

C. The Utah Democratic Party

At the district court the Utah Democratic Party ("UDP") intervened as a plaintiff in part to "ensure [the State] appl[ies] the laws equally to all Utahns, no matter what political party, if any, they choose to join." Aplt. App. 99. The UDP— joined in this instance by the State—argues that the URP's arguments in this lawsuit are barred by the doctrines of claim preclusion, issue preclusion, and claim splitting based on the outcome of the First Lawsuit. Democrats Br. at 17–24; Aple. Br. at 47. Because we hold that the URP's constitutional claims fail, we have no reason to reach the merits of the UDP's cross-appeal from the district court's ruling that the URP's arguments were not so barred.[25]

Additionally, the UDP argues that the district court erred in invalidating portions of the URP's constitution and bylaws that conflict with SB54 as interpreted by the Utah Supreme Court and the district court. Democrats' Br. at 9–10. Specifically, the UDP takes issue with the district court's comment that the "stated URP intention to ban a member from nomination if that member fails to secure at least 40% of the delegate vote at convention is directly contrary to state law and is invalid." See *URP IV*, 178 F. Supp. 3d at 1184. The UDP argues that the district court

[25] In so doing we also express no opinion on the URP's claim that these arguments necessarily fail under Rule 28(i) and the "cross-appeal" rule. See Aplt. Reply at 25– 27 (citing Fed. R. App. P. 28(i) and *Bernstein* v. *Bankert*, 733 F.3d 190, 224 (7th Cir. 2013)).

was powerless to invalidate the URP's bylaws, and the choice of whether to comply with state law (and remain a QPP) or violate state law (and revert to RPP status) should be left with the URP. Democrats' Br. at 11–13. In other words, the UDP argues that the district court should have invalidated the URP's status as a QPP rather than simply striking the offending provisions in the URP bylaws so the URP would remain a QPP.

This is essentially the exact question certified to the Utah Supreme Court by the district court earlier in this litigation. On April 8, 2016, the Utah Supreme Court addressed the following question, certified at the request of the UDP: "If a registered political party (RPP) that has selected to be designated as a Qualified Political Party (QPP) fails to satisfy the requirements of a QPP, must the Lieutenant Governor treat that political party as a RPP under Utah law?" *Utah Republican Party* v. *Cox*, 373 P.3d 1286, 1287 (Utah 2016). The Utah Supreme Court declined to answer that question, concluding that it was not yet ripe for review. *Id.* We agree.

Drawing its application both from "Article III limitations on judicial power" and "prudential reasons for refusing to exercise jurisdiction," *Stolt-Nielson S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010), "[t]he ripeness doctrine aims to prevent courts from entangling themselves in abstract disagreements by avoiding premature adjudication." *Awad* v. *Ziriax*, 670 F.3d 1111, 1124 (10th Cir. 2012) (internal quotations omitted). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas* v. *United States*, 523 U.S. 296,

300 (1998) (quoting *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)). Prudential ripeness is traditionally considered through the two-prong test established in *Abbot Labs* v. *Gardner*, 387 U.S. 136, 149 (1967), under which courts assess (1) "the fitness of the issues for judicial decision[,]" and (2) "the hardship to the parties of withholding court consideration." See, e.g., *Fourth Corner Credit Union* v. *Fed. Reserve Bank of Kan. City*, 861 F.3d 1052, 1059 (10th Cir. 2017) (Matheson, J., concurring) (quoting *United States* v. *White*, 244 F.3d 1199, 1202 (10th Cir. 2001)).

In declining to answer the certified question, the Utah Supreme Court noted that it was as yet unclear whether the URP, if it were to lose its challenge to SB54's constitutionality, would enforce its constitution and bylaws. *Utah Republican Party*, 373 P.3d at 1288 ("At present there are multiple options available to the Republican Party once this court's interpretation of the QPP statute is published, and it is not clearly established in the record which of those the party will choose."). In assessing the record before us, we find that nothing has changed in this respect. As the Utah Supreme Court observed, the URP has offered conflicting statements during the course of this litigation about its intention to comply with SB54. Compare *id.* at 1288 ("The Chairman of the Utah Republican Party sent a letter to the Lieutenant Governor in December 2015 declaring that 'it would restrict its candidate-selection procedures to the convention method, thereby prohibiting any URP candidate from gathering signatures.'") with *id.* at 1288–89 ("More recently, however, counsel for the Republican Party [stated that] 'if the state law says that we have to allow both routes and if that is what

the Supreme Court decides and if we have elected to be a QPP, then we would have to figure a way how to change our constitution and by-laws to conform to the state law.'").

Against this backdrop, the doctrine of ripeness counsels that it is premature for this Court to determine the appropriate remedy should the URP flout the dictates of SB54. Considering first the "fitness of the issues for judicial decision," *Abbott Labs*, 387 U.S. at 149, we find that the UDP's cross-appeal is littered with uncertainty. Perhaps, following the conclusion of this lawsuit, the URP will expel members who choose to pursue the primary ballot through the signature-gathering process. Doing so would violate state law under the Utah Supreme Court's interpretation of the Either or Both provision, and the question of what remedy is appropriate would thus ripen for review. Perhaps the URP will decline to enforce its bylaws, in which case the UDP's claim of hardship would become moot.[26] Perhaps the URP will voluntarily amend its constitution and bylaws in response to this litigation prior to the 2018 election, which will again moot this question. Given this uncertainty, we cannot conclude that the issue of what remedy is appropriate when a political party's constitution and bylaws contravene state law is

[26] It is possible that if the URP leaves its bylaws and constitution intact but simply refuses to enforce them, there may be some hardship to individual candidates or the UDP by virtue of the chilling effect those bylaws would have on potential candidates. This issue was not raised by the parties, however, and thus we decline to address it. The UDP's claims were dismissed by the district court without prejudice, Aplt. App. 1203–04, thus if it would like to renew this claim of hardship at a later date, it is free to do so.

prudently fit at this time for judicial consideration before this court.[27]

As for the second prong, "the hardship to the parties of withholding court consideration," id., we do not find that the UDP will be significantly impaired by our decision here today. By declining to address the remedy of a violation which may never occur, we simply maintain the status quo. Accordingly, we find that the Democrats' alleged injury is not ripe for review.

D. URP Attorney Marcus Mumford

Finally we address the conduct of Mr. Marcus Mumford, an attorney for the URP. After he repeatedly missed deadlines at the Tenth Circuit, a panel of our colleagues took the extraordinary step of placing Mr. Mumford on notice that "the judges assigned to decide this appeal on the merits may wish to address in greater depth counsel's noncompliance with the court's rules." *Utah Republican Party* v. *Cox*, No. 16-4091, Order Granting Appellant's Motion to Accept Late Brief (Dec. 16, 2016).

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[27] The Court does take judicial notice of the fact that multiple Utah Republican candidates have qualified for primary election ballots using the signature-gathering method—including the current Republican Governor—and have not been expelled from the Party. See, e.g., Ben Winslow and Mark Green, *Gov. Gary Herbert forced into primary election with Jonathan Johnson*, FOX31 SALT LAKE CITY, (April 23, 2016) http://fox13now.com/2016/04/23/gov-gary-herbert-forced-into-primaryelection-with-jonathan-johnson/ ("Because he gathered signatures under the "Count My Vote" compromise law, Herbert has a guaranteed spot on the ballot, despite failing to secure the convention nomination.").

Mr. Mumford triggered this notice through a series of procedural and timeliness violations in the submission of his opening brief. First, the brief did not satisfy this Court's rules, in that it did not state the opposing party's position on the relief requested as required by Tenth Circuit Rule 27.1. Second, Mr. Mumford failed to comply with Tenth Circuit Rule 31.5 by not providing this Court with hard copies of his brief within two business days of the brief having been filed electronically.

Our colleagues—correctly, in our opinion—noted but did not linger on these errors. More troubling, however, was Mr. Mumford's repeated inability to file papers in a timely manner. Rather than paraphrase the extensive timeliness problems associated with this brief, we simply incorporate our colleagues' findings:

> The opening brief was originally due September 27, 2016. The appellant requested and was granted an extension of time to file the opening brief until October 27, 2016. The appellant then requested a 96-day extension of time to file the opening brief, or until January 31, 2017. At the direction of the court, the appellant was granted a portion of the requested extension. We allowed 30 additional days to file the opening brief, which pushed the filing deadline to November 28, 2016. The court advised that no additional extensions of time to file the opening brief would be granted.
>
> On November 28, 2016, the appellant electronically filed a four volume

> appendix. No opening brief was submitted with the appendix, however. Two days later, having received no opening brief, the court issued a deficiency notice to the appellant regarding the missing brief. The court *sua sponte* granted 10 additional days to file the opening brief. The opening brief was due December 12, 2016.
>
> With the additional time provided by operation of the deficiency notice and an intervening weekend, the appellant had *14 additional days* beyond the final extension deadline to file the opening brief. But even with all of this additional time, the appellant still did not file the opening brief on the due date. The brief was due December 12, 2016, but was not filed until the morning of December 13, 2016. Compounding the problem further is the fact that the [Motion to Accept Late Brief] was not filed until December 14, 2016, two days after the deadline set in the deficiency notice expired.

Utah Republican Party v. *Cox*, No. 16-4091, Order Granting Appellant's Motion to Accept Late Brief (Dec. 16, 2016). Notwithstanding these errors, our colleagues tolerantly excused the untimely submission and granted the Motion to Accept Late Brief, albeit with the language regarding Mr. Mumford quoted above. *Id.*[28]

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[28] We also note that similar tardiness on Mr. Mumford's part in the First Lawsuit led that court to order Mr. Mumford to add co-

Like our colleagues, we are troubled by this pattern of untimeliness. If it were to continue in future appeals we might be forced to consider taking action against Mr. Mumford. While at this time we do not feel his conduct has risen to the level necessary to support such drastic sanctions, he would be well-served to approach his next foray into our courthouse with a keen attention to timeliness and detail.

IV. CONCLUSION

States must have flexibility to enact reasonable, common-sense regulations designed to provide order and legitimacy to the electoral process. SB54, as modified in the First Lawsuit, strikes an appropriate balance between protecting the interests of the state in managing elections and allowing the URP and all other political associations and individuals across Utah to express their preferences and values in a democratic fashion and to form associations as protected by the First Amendment to the Constitution.[29] Not only does this balance not offend our Constitution, it is at its very essence. Accordingly, we AFFIRM.

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counsel due to his "demonstrated inability to manage deadlines and because of his repeated failure to comply with court orders throughout this case[.]" *Utah Republican Party* v. *Herbert*, No. 2:14–CV–00876– DN–DBP, 2015 WL 6394534, at *7 (D. Utah Oct. 22, 2015).

[29] Of course, our decision addresses only the issues presented to us. We do not address the reach of governmental power to regulate other associational nominating decisions.

TYMKOVICH, C.J., concurring in part and dissenting in part.

American legal thought is famed for its focus on procedure. And there is good reason: as every first-year civil procedure student learns, substance and procedure frequently form a Gordian knot—impossible to disentangle.[1] This insight carries over into the Law of Democracy. One change to procedure can work a profound change to the substance of political parties, including which candidates they choose and what messages they communicate.

In this case, the Utah Republican Party claims that Utah's 2014 election law reforms purposely try to change the *substantive type* of candidates the Party nominates, all the while masquerading as mere *procedural* reform. If true, such a project would severely burden the Party's associational rights, and without compelling justifications, it would be unconstitutional.

Because that is exactly what Utah has tried to do and because Utah has not provided adequate justification for placing such a burden on the Party's associational rights, I would hold Utah's election law violates the First Amendment. Though I dissent for this reason, I concur with the majority that the number of signatures required by the law's signature-gathering provision does not violate the Constitution.

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[1] See Paul MacMahon, Proceduralism, *Civil Justice, and American Legal Thought*, 34 U. Pa. J. Int'l L. 545, 594–610 (2013); see also Thurman W. Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 Harv. L. Rev. 617, 643 (1932).

I. Background

The Utah Republican Party argues Utah's recent reforms violate its First Amendment associational rights. Utah's Lieutenant Governor contends Utah's legislation is well within the state's regulatory power over elections. To evaluate these claims, we must first look at what those reforms sought to accomplish.

A. Utah Republican Party's Nomination Procedures

Before Utah passed legislation known as Senate Bill 54 in 2014, Utah election law gave political parties freedom to choose how they would nominate candidates for the general election. Parties could choose whether or not to use the state's primary election mechanism.

With that freedom, the Utah Republican Party chose not to use the primary as its principal means of selecting candidates. Instead, the Party had, and continues to employ, a carefully crafted convention process. Party members in defined precincts conduct neighborhood caucus meetings. In accordance with the Republican Party's bylaws, each caucus meeting is open to the public and begins with prayer, a recitation of the pledge of allegiance, and a reading of the Party's platform. The caucus attendees in turn select community representatives to serve as delegates to the Party's convention, where nominees will eventually be considered and selected.

The Party's nominating conventions are also open to the public. After candidates or their representatives make nomination speeches, delegates cast their votes for candidates to each office. If a candidate obtains

sixty percent of the vote, he or she becomes the Party's nominee for that office in the general election. If there are more than two aspiring candidates for a given office, ballots are conducted until there are only two remaining candidates or until a candidate gains sixty percent of the vote. And if there are two candidates left and neither has obtained sixty percent of the vote, the candidates participate in a primary election run by the state. This means the Party uses the primary election mechanism only when no candidate for a contested office could obtain sixty percent of the delegates' vote. In other words, a consensus convention nominee with sixty percent of the convention vote gets the nomination—leaving no room for a party challenger by other means.[2]

The Republican Party claims it has developed this convention-based nomination process over the years to ensure the selection of nominees who will best represent the Party's platform. Because a maximum of two candidates ever participate in a primary election for a given office, these procedures also guarantee that nominees chosen through a state-run

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[2] This did not mean the Party never participated in state-run primaries. From 2002 to 2010, a number of state house and senate districts participated in a Republican primary during each primary election cycle. See Utah Lieutenant Governor's Office, *Election Results*, https://elections.utah.gov/election-resources/election-results (last visited Feb. 21, 2018). Nor did it mean conventions were an incumbent-protection machine. See David Catanese, *Sen. Bennett loses GOP Nomination*, Politico (May 10, 2010), https://www.politico.com/story/2010/05/sen-bennett-loses-gop-nomination-036960 (noting how outsiders beat incumbent Senator at the Party's convention to gain spots on primary ballot).

primary will have obtained a majority (and not just a plurality) of party members' votes.

The Party's candidate qualification requirements, like its nomination procedures, are designed to make certain that nominees are committed to the Party's platform. All candidates must file a statement certifying that they do not hold a position in any other political party. They must also certify they have read the Party's platform and accept it as the standard by which their performance as an officeholder will be evaluated. Candidates must file these certifications at least thirty days before the convention. If they do not, the Party Chairman announces this failure before the delegates vote.

As an additional security measure against the possibility of unfaithful nominees, the Party's bylaws require nominees to certify they will abide by the Party's nomination procedures. These procedures do not allow for any method to gain the nomination other than competition in the Party's convention.

B. Senate Bill 54

The events leading up to this case began in 2013. According to the Party, and uncontested by Utah, a bipartisan group registered as the Utah Political Issues Committee Alliance for Good Government, but known popularly as Count My Vote, began lobbying the Party to change its nomination procedures. The group believed the convention method gave "the most power and influence to those with the most extreme views," presumably because only the most fervent and eager undertake the inconvenience of attending a

caucus meeting.[3] In its view, this "extremism" was pernicious because the Republican Party is presently the dominant party in Utah and its nominees are favored to win many district- and state-wide elections in the general elections.

To confront this perceived problem with the Republican Party's nominees, or in other words, to "require political party nominees to show a sufficiently broad level of support in order to appear on the general election ballot,"[4] the group repeatedly asked the Party to change its nomination rules. If the Party did not comply, the group threatened to bring a ballot initiative to change the Party's nomination rules against its will. Specifically, it wanted the party to accept absentee votes at conventions and increase the number of votes required for candidates to secure the nomination at a convention. This way, contested nominations would more often be decided with a primary election.

The Republican Party refused. Undaunted, Count My Vote registered its initiative and began efforts to persuade the Utah legislature to enact its desired reforms.

The result was Senate Bill 54. Enacted in 2014, it completely overhauled the requirements political parties must meet to have their nominees placed on

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[3] See Count My Vote, *Why Change Utah's Election System?*, http://www.countmyvoteutah.org/facts (last visited Feb. 21, 2018).

[4] See Count My Vote, Citizens' Initiative Petition 4–5 (2013), http://www.countmyvoteutah.org/s/Submitted-Initiative-Application-duv3.pdf.

Utah's general election ballot. No longer are parties free to select their nomination procedures. "Each registered political party that chooses to have the names of the registered political party's candidates for elective office featured with party affiliation on the ballot at a regular general election," the bill provides, "shall nominate the registered political party's candidates for elective office in the manner described in this section." Utah Code Ann. § 20A-9-403(1)(b).

The bill creates two possible paths for political parties to earn the right to place their endorsements on the ballot—they can be "registered political parties" or "qualified political parties." For registered political parties, participation in the primary is mandatory. "Each registered political party" must "either declare the registered political party's intent to participate in the next regular primary election" or declare that it chooses "not to have the names of the registered political party's candidates for elective office featured on the ballot at the next regular general election." § 20A-9-403(2)(a).

To earn a place on the primary ballot, candidates for a registered political party have one choice only: to collect nomination petitions from "at least 2% of the registered political party's members who reside in the political division" for the office sought. § 20A-9-403(3)(a).

A "qualified political party," by contrast, is allowed to use a convention to select nominees. But this comes at a cost. Qualified political parties must permit delegates to vote by absentee ballot. And they must allow members to seek nomination *either* by using the party's convention *or* by collecting a statutorily

designated number of signatures (which varies by office), *or* both. § 20A-9-101. This is called the "Either or Both" provision.

Whenever there is at least one candidate chosen by convention and at least one who gained candidacy for the same office by collecting signatures, a qualified political party must participate in a primary election to choose between them. The same is true when there are two or more persons who gained candidacy for the same office by collecting signatures. § 20A-9-409(2). Unlike registered political parties, then, qualified political parties do not necessarily have to participate in the primary election. They only must do so when there are persons who gathered signatures to become candidates.

Candidates who obtain "the highest number of votes" in the primary election, regardless of whether they gained candidacy by convention or signature collection, are deemed "nominated for that office by the candidate's registered political party." § 20A-9-403(5)(a). Parties cannot opt out of this scheme while still retaining their ability to list their affiliation with candidates on the ballot.

And that was not all. As originally passed, Senate Bill 54 also required qualified political parties to allow voters unaffiliated with any party to sign nomination petitions and vote in the party's primary election.

C. The Lawsuits

In 2015, the Utah Republican Party filed suit against Utah's Lieutenant Governor to enjoin the law's application to the Party. The Party concentrated its arguments on the provision requiring it to allow

unaffiliated voters to vote in its primary and sign nomination petitions. The district court in Utah held that provision unconstitutional because it unduly burdened the Utah Republican Party's associational rights. *Utah Republican Party* v. *Herbert*, 144 F. Supp. 3d 1263, 1278 (D. Utah 2015). That judgment is not before us.[5]

The subject of this appeal is the Utah Republican Party's second as-applied challenge to Senate Bill 54. After the first suit, the Party sought clarification from Utah's Lieutenant Governor on whether he would uphold the Party's objections against any candidate who obtained a spot on the primary ballot by using the signature gathering method, which the Party's bylaws did not allow. The Lieutenant Governor responded that his office would not uphold objections to candidates solely because they used the signature-gathering method to gain candidacy. State law, the Lieutenant Governor said, required the Party to allow members to use the signature collection method to become a nominee.

In early 2016, the Party again filed suit, arguing, among other things, that Senate Bill 54 was unconstitutional as applied to the Party because it (1) required the Party to participate in a primary election; (2) required the Party to accept candidates who gathered signatures, in violation of its bylaws; and (3) required an unconstitutionally burdensome

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[5] The Utah Republican Party argues judicial estoppel prevents Utah from asserting its interpretation of the Either or Both provision in this case. But a review of the record unambiguously demonstrates that Utah's position in the first lawsuit is not at odds with its position in this case. See JA 1143.

number of signatures for qualified political party members to become State House or Senate candidates in the primary.

Upon certification from the district court, the Utah Supreme Court interpreted the Either or Both provision and agreed with the Lieutenant Governor: the law requires the Party to allow members to become nominees by collecting signatures.[6]

On motions for summary judgment and judgment on the pleadings, the district court entered summary judgment for Utah on all claims, holding the burden these provisions placed on the Republican Party's associational rights was not severe and that the state's interests were substantial enough to justify what little burden existed. The Utah Republican Party has appealed every claim.[7]

I dissent because I believe the Party is correct that, in the circumstances of this case, Utah's interference in the Party's nomination process was unconstitutional. At a minimum, the majority is wrong to conclude Senate Bill 54 is clearly constitutional on this record. There is at least a material dispute of fact as to the burden on the Party's rights and the sufficiency of the state's interests. I

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[6] *Utah Republican Party* v. *Cox*, 373 P.3d 1286, 1287 (2016). The Utah Supreme Court declined to address what the consequences would be if the Republican Party disobeyed Senate Bill 54 by, for example, expelling a member who used the signature collection route to candidacy. *Id.* at 1288–89.

[7] The Utah Democratic Party—which intervened below—also cross-appealed on various grounds, but it cannot do so because it voluntarily dismissed its claims below. *Coffey* v. *Whirlpool Corp.*, 591 F.2d 618, 620 (10th Cir. 1979).

concur with the majority that, if Senate Bill 54 is otherwise constitutional, the number of signatures required for State House and Senate candidacies is not unconstitutional.[8]

II. Analysis

The election context is, like so many areas covered by the First Amendment, one of competing rights. And like many situations in which two constitutional principles come head to head, the touchstone of a court's analysis is balancing.

A. Legal Framework

"A political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform." *N.Y. Bd. of Elections* v. *Lopez Torres*, 552 U.S. 196, 202 (2008) (citations omitted) (approving

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[8] Utah argues (by incorporating the Utah Democratic Party's argument) that the Utah Republican Party's claims are barred by issue preclusion, claim-splitting, and claim preclusion because of its first lawsuit. After carefully reviewing the record, it appears only the claim preclusion argument can possibly have merit. It is clear from the record that claim preclusion does not apply to the Republican Party's claims against the Either or Both provision or the signature-gathering provision. JA 582, 584–85. But the Republican Party's first lawsuit did squarely bring up a discriminatory animus claim. See JA 57–60, 77–78. And the Party had all the information it needed to make that claim at that time. Consequently, the Party's discriminatory animus claim is barred by claim preclusion. *Lenox MacLaren Surgical Corp.* v. *Medtronic, Inc.*, 847 F.3d 1221, 1239 (10th Cir. 2017). Although we normally disfavor incorporation by reference, cf. 10th Cir. R. App. P. 28.4, I would hold the district court erred by not so deciding.

convention nomination process). Indeed, the First Amendment affords "special protection" to "the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences." *California Democratic Party* v. *Jones*, 530 U.S. 567, 575 (2000) (internal quotation marks and citation omitted; alterations incorporated) (striking down blanket primary law). And this makes sense, as the nomination process is one that "often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views." *Id.*

At the same time, the Constitution explicitly grants states power to select the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl. 1, and this power is "matched by state control over the election process for state offices." *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 217 (1986) (striking down closed primary scheme)

Our evaluation of First Amendment challenges to state election laws attempts to account for these dueling interests. We "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Anderson* v. *Celebrezze*, 460 U.S. 780, 789 (1983). We "then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.*

In balancing these considerations, "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992). When "rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Id.* (internal quotation marks and citation omitted). "But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (internal quotation marks and citation omitted).

Put more simply, if the burden on a Party's rights is severe, the state must have compelling interests in the regulation and the regulation must be narrowly drawn to protect those interests. But if the burden is a slight one, important state interests will do. So in this case, we must first consider the magnitude of the law's burden on the Republican Party's associational rights. We then look to whether the state's interests justify that burden. Because we are reviewing a grant of summary judgment as well as a constitutional challenge to a statute, our review is de novo. *Ball* v. *Renner*, 54 F.3d 664, 665 (10th Cir. 1995); *United States* v. *Ramos*, 695 F.3d 1035, 1045 (10th Cir. 2012).

B. The Mandatory Primary and Either or Both Provision

1. The Mandatory Primary provision and the Either or Both provision must be evaluated together

The Utah Republican Party elaborates separate arguments against (1) the requirement that it participate in a primary to choose between signature-collecting candidates and convention candidates (what it calls the "mandatory primary"), and (2) the requirement that it allow members to become primary election candidates by collecting signatures. But the distinction between the two provisions has little relevance for the purposes of this analysis.

In this as-applied challenge, we evaluate only the provisions that apply to the Utah Republican Party. Here, those are the provisions related to qualified political parties, not registered political parties. While Senate Bill 54 requires registered political parties to participate in the primary, it does not mandate participation of qualified political parties in every case. Instead, qualified political parties only have to participate in the primary when they must decide (1) between signature-gathering candidates and convention-chosen candidates, or (2) between two signature-gathering candidates. *See* Utah Code Ann. § 20A-9-409(2). If a party's only candidates for an office are chosen at its convention, the party "may, but is not required to, participate in the primary election for that office." *Id.* For qualified political parties, then, the requirement to participate in the primary only

exists when the signature-gathering path to nomination is used.

In short, the two provisions work as one and cannot be evaluated separately. The question is not whether each provision, in isolation, is constitutional. It is whether this scheme, as a whole, imposes a severe burden on political parties' associational rights, and if so, whether Utah has presented interests compelling enough to justify that burden.

2. The Burden

First, we analyze the burden. Senate Bill 54's effects are further confirmation of the truism that procedure can have enormous substantive repercussions. Not only does the law interfere with the Utah Republican Party's internal procedures, but it also changes the types of nominees the Party will produce and gives unwanted candidates a path to the Party's nomination. By doing so, Senate Bill 54 will inevitably cause divisiveness within the Party and reduce candidate loyalty to the Party's policies. Put together, these consequences severely burden the Party's ability to choose a loyal nominee and, ultimately, its right to define itself and its message. I explain each of these effects in turn.

To begin, Senate Bill 54 "substitute[s]" the Utah legislature's "judgment for that of the party as to the desirability of a particular internal party structure." *Eu* v. *San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 233 (1989). The law is, in effect, a sort of state-created majority veto over the candidates a party selects through its carefully crafted convention process. And it gives aspiring candidates license to ignore a party's chosen convention procedures without

ever having to convince other members to vote to change those procedures.

Such changes to a group's internal nominee selection process affect a group's ability to define itself. That is to say, they change the group's substance. Consider as illustration a Catholic parish. Imagine a situation in which parishioners could collect signatures to challenge their formally selected priest in a congregational election. Would not something substantive about the church have changed? Some might call this procedural reform. But it is more like a Reformation. And the profound importance of leadership selection is not limited to the religious context. Every group's leadership-selection procedures help define its substance—whether hierarchical, uber-democratic, or a mix. This defining choice is, constitutionally, up to each group, unless important state interests are at stake.

Here, the possibility Senate Bill 54 will substantively alter the Utah Republican Party's character is not mere speculation. It is very real. The Utah Republican Party's neighborhood caucus meetings are a communitarian affair—with shared prayer, competition for delegate slots, and local electioneering in support or opposition to candidates and platform recommendations. Under Senate Bill 54, candidates can evade the scrutiny of delegates chosen at these meetings, ignoring the caucus system altogether. In effect, the new procedures transform the Party from a tight-knit community that chooses candidates deliberatively to a loosely affiliated collection of individuals who cast votes on a Tuesday in June. Cf. generally David P. Redlawsk et al., *Why Iowa?: How Caucuses and Sequential Elections*

Improve the Presidential Nominating Process (2010) (arguing that compared to a primary system, the Iowa Caucus encourages greater candidate interaction with voters as opposed to impersonal campaign advertising).

Second, Senate Bill 54 will likely change the types of candidates the Party nominates. That was precisely the purpose of the law's promoter, Count My Vote.[9] A nomination process filtered through a convention of party regulars will generate different candidates than one accomplished by polling the crowds, among whom are many persons who only nominally associate with the Party.

Count My Vote understood that. So does the Party. Whether it makes candidates more moderate, as Count My Vote would have it, or allows for more extreme candidates divorced from the influence of party leadership, the signature-gathering path to nomination will produce "nominees and nominee positions other than those the part[y] would choose if left to [its] own devices." See *California Democratic Party* v. *Jones*, 530 U.S. 567, 582 (2000).[10]

Third, the law violates the Party's right *not* to associate with an unwanted candidate, a "corollary of

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[9] See, e.g., JA 57–59; Count My Vote, Public Hearing Presentation, http://www.countmyvoteutah.org/public-hearing-presentation (last visited Feb. 21, 2018) (Arguing the caucus system made "candidates more extreme, and amplified non-competitive elections"); *id.* ("Delegate Priorities Don't Represent Utah Voters").

[10] As I discuss further below, there is no reason to believe that grass roots, insurgent candidates are more likely to be the more centrist nominee. One only need look around at a few recent elections at every level to know that claim is dubious.

[its] right to associate." *Id.* at 574. "In no area is the political association's right to exclude more important than in the process of selecting its nominee." *Id.* at 575. Yet under this regime, a person who collects signatures can be named the Party's nominee in spite of the fact that he or she has broken the Party's rules regarding how to seek the nomination.

What is more, this scheme allows nominal members or even members hostile to the Party's policies to hijack the Party's platform. So long as a person has means (by fame or fortune) to obtain the requisite number of signatures, he or she can challenge the Party's chosen convention candidate in a primary election. This is no small burden on the Party's right of dissociation, for the spoils of winning the primary are not just a place on the general election ballot (which can be obtained as an unaffiliated candidate). The spoils are a place *as the Party's nominee*.

As even counsel for the Utah Democratic Party admitted at oral argument, that presents a "[*California Democratic Party* v.] *Jones* problem,"[11] because it is the kind of violation of the freedom not to associate that the Supreme Court condemned in *Jones*, 530 U.S. 567 (2000). In that case, California enacted a partisan blanket primary in which all voters, regardless of party affiliation, could vote for any party's nominees. *Id.* at 569–70. The Court held that scheme unconstitutional in part because it created the possibility parties would be "saddled with

[11] Oral Argument at 16:40–17:45.

an unwanted, and possibly antithetical, nominee." *Id.* at 579–81.

Forcing the Party to accept nominees who circumvent the Party's chosen nomination method by appealing to members at the fringes of the Party accomplishes the same thing. It can "saddle" the Party with a nominee who is "antithetical" to the integrity of the Party and its long-term message.

Fourth, this law is likely to cause divisiveness within the Party's ranks. It does not require much foresight to predict that a face-off between a Party's chosen convention candidate and a signature-gathering insurgent will create rifts among the Party's members. See Paul Pennings & Reuven Y. Hazan, *Democratizing Candidate Selection: Causes and Consequences*, 7 Party Politics 267, 271 (2001) (discussing this effect for primaries). Fueling intra-party strife endangers an association's very existence almost as much as the inability to exclude. Neither houses divided nor houses without walls can stand.

Fifth, Senate Bill 54 may undermine "the loyalty of candidates to party policies" by "putting candidates in a more independent position vis-à-vis the party and its leadership." *Id.* "[W]hen their nomination depends on the general electorate rather than on the party faithful," it is less likely that "party nominees will be equally observant of internal party procedures and equally respectful of party discipline." *Jones*, 530 U.S. at 581. The same logic applies here.

While only party members can vote in the party's primary, not all members are the same. As the Supreme Court recognized, "the act of formal enrollment or public affiliation with the Party is

merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important." *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 215 (1986). Senate Bill 54 forces the Party to include people who only marginally identify with the party in its nomination decisions. This change will lessen candidates' loyalty to the Party relative to the Party's preferred convention process. A candidate may still formally have to certify agreement with the Party's policies, but faithful delegates are no longer able to hold rogue candidates accountable. And because more than two candidates may end up running in the primary election and split the vote, a person can gain the nomination without a majority of the vote—intensifying the risk that a nominee will be disloyal to the Party platform.

In sum, then, Senate Bill 54 interferes with the Party's internal procedures, changes the kinds of nominees the Party produces (is, in fact, meant to do so[12]), allows unwanted candidates to obtain the Party nomination, causes divisiveness within the Party, and reduces the loyalty of candidates to the Party's policies.

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[12] See Count My Vote, Why Change Utah's Election System?, http://www.countmyvoteutah.org/facts (last visited Feb. 21, 2018) (arguing the convention system gives "the most power and influence to those with the most extreme views"); Senate Day 24, 2014 53:00–60:00, http://le.utah.gov/jsp/jdisplay/billaudio.jsp?sess=2014GS&bill=sb0054&Headers= true (last visited Feb. 22, 2018) (Senator Bramble stating that Senate Bill 54 addressed Count My Vote's concerns and attempted to increase "competitive races between competing philosophies" in state primaries).

When an association grows large, the risk the association's central message will be lost amidst a sea of nominal members grows too—especially if the group must maintain an inclusive membership policy. Many organizations respond by leaving membership relatively open, but restricting leadership to those who are "true believers," so to speak, in the group's mission. That is what the Party has tried to do. At core, Senate Bill 54's sin lies in taking this option away. In so doing, the law constrains the Party's ability to carry out its most central associational mission—its selection of a faithful nominee.

In spite of the foregoing burdens, the majority opinion concludes the law's overall burden on the Party's associational rights is light. The majority bases this conclusion on five main reasons: (1) its conclusion the law does not regulate the Party's internal process, (2) the Party's continued ability to use traditional advertising channels to endorse the candidate of its choice, (3) the fact the Party's members still get to choose the nominee, (4) states' ability to regulate "the scope" of party primaries, Maj. Op. at 18, and (5) the Supreme Court's dicta on the power of states to mandate primaries. Since the Supreme Court's dicta relates to both the Party's burden and Utah's interest, I will address its continued vitality after I discuss the relevant state interests. As for the other reasons, I respectfully suggest they are mistaken.

To begin, the majority holds Senate Bill 54 does not "regulate the party's internal process" because "in fact its grand compromise was to maintain the [Party's] traditional caucus system as a path onto the primary ballot." Maj. Op. at 19. Yet this observation

misses the point. The problem is not that the Party cannot use the caucus system at all. The problem is that the Party cannot use the caucus system as its exclusive means of nomination while still being able to list its endorsements on the ballot. The law requires the Party to allow members to either force a primary race or participate in one by collecting signatures. It is confounding to maintain that such a change does not "regulate the party's internal process."[13]

Next, the majority, like the district court, argues the Party's freedom not to associate with unwanted candidates is sufficiently protected because the Party's leadership can publicly disavow signature-gathering candidates. That cannot be correct. Imagine a political party chooses a "legislator of the month" and gives Senator Sally a badge. Now imagine the government confers that title to Bob as well, and gives him an identical badge. It cannot be the case the party's associational rights have not been trampled upon simply because the party can just tell people that Bob is not the "real" legislator of the month. If that

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[13] Because Senate Bill 54 was born of a "Great Compromise" between Count My Vote and a mostly Republican legislature, the majority also suggests the law actually helps the Party. Maj. Op. at 25 n.15. But why should it matter the bill was a compromise the Utah legislature entered into to avoid a ballot initiative? Whether or not the legislature was trying "to save the [Party] from undertaking a course of conduct destructive of its own interests"—which in any event the state is not allowed to do, *Tashjian*, 479 U.S. at 224—Senate Bill 54 coerces the Party just as much as an initiative would have. And, more to the point, the Party and the Republican members of Utah's legislature are not entirely the same thing or necessarily aligned on every issue.

were true, not much would be left of the right not to associate.

In *Jones*, the "ability of the party leadership to endorse a candidate" did not lessen the burden on "party members' ability to choose their own nominee." 530 U.S. at 580. So too, the ability to publicly disavow a candidate does not alleviate the forced association imposed on the Party here. Persons who gather signatures are listed as the Party's candidates in the Party's primary ballot and can become the Party's nominee in the general election ballot—all in contravention of the Party's express rules. The ability to publicly deny those candidates is no solution. Indeed, tactical considerations will seriously constrain that ability in practice: the denounced candidate may end up the Party's only nominee in the general election.

The majority further suggests, again like the district court, that there can be no severe burden on the Party so long as nominees are ultimately chosen by the Party's members. The majority argues we must "define the association with the requisite specificity" and proceeds to define the Party as a collection of "roughly 600,000 registered Republicans." Maj. Op. at 20-22. Because Senate Bill 54 still permits those party members to choose the nominee, the majority concludes the burden is minimal.

There are two problems with this theory. First, it assumes that nothing of substance changes when nomination is transferred from the party's established convention-based system to a large-scale vote by its members. The error of this line of reasoning has already been explained. Nomination procedures can

be substantive, and we err if we consider such a change immaterial.

Second, in order to hold that all is well so long as Party members choose the nominee, the majority defines political parties as merely a collection of members. That is wrong. A political party is more than the sum of its members. Political science literature has long observed parties have several components, only one of which is their membership. See, *e.g.*, Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 Colum. L. Rev. 775, 778 (2000) (describing the distinction between the "party-in-the-electorate," the "party-in-the-government," and "professional political workers"). Parties therefore have associational rights that are distinct from those of the individuals that form its membership. The superstructure of the party—its bylaws, customs, and leadership—are protected by the First Amendment too.

If this were not true, then states would have plenary power to alter the internal regulations of political parties, so long as they left ultimate nomination decisions up to party membership. But the Supreme Court has already rejected that theory. It has held that "[f]reedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders" and that "a State cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure." *Eu* v. *San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 229, 232–33 (1989). And, contrary to the majority's suggestion, these rights are not cabined to "internal activity." See

Maj. Op. at 14. They extend to a party's choice of nominee too. Tashjian dealt with what the majority might call the "external activity" of nomination, and yet the Court still explained that a "Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." 479 U.S. at 224 (emphasis added).

What is more, the Supreme Court routinely distinguishes between "the rights of political parties" and those of "their members." See *Eu* v. *San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 219, 231, 232, 233 (1989); id. at 229 ("These laws directly implicate the associational rights of political parties and their members" (emphasis added)); *Tashjian*, 479 U.S. at 217 (evaluating "the burden cast by the statute upon the associational rights of the Party and its members" (emphasis added)); *Timmons*, 520 U.S. at 363 (the statute did not "restrict the ability of the New Party and its members to endorse . . ." (emphasis added)); *Jones*, 530 U.S. at 581 ("the ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the party leadership, but do not want the party's choice decided by outsiders").

In *Jones*, it is true, the Supreme Court specifically emphasized the fact that party members could not choose nominees. *Id.* But the Supreme Court did not thereby hold that a party is only defined by its members. In fact, that case was brought because party

leadership and bylaws allowed only party members, and not non-members, to choose the nominee.[14]

Lastly, the majority claims Senate Bill 54 does not unduly burden the Party because it only regulates the "*scope* of a party primary." See Maj. Op. at 18 (emphasis in original). It is unclear what is meant by the "scope" of a primary, but *Clingman* v. *Beaver*, cited as support for this proposition, only holds that states can restrict the pool of voters who can vote in a state-run primary to a party's members and Independents. 544 U.S. 581, 590 (2005). The reasons for that holding—most saliently that "a voter who is unwilling to disaffiliate from another party to vote in [a party's] primary forms little 'association' with the [party]—nor the [party] with him"—are wholly absent in this case. See *id.* at 589. And nothing in *Clingman*'s holding suggests the State has carte blanche authority to reshape a Party's nomination procedures. Indeed, even the state's authority to limit the voter pool for a state-run primary is limited. The Supreme Court has held parties have a First Amendment right to include unaffiliated voters in their party primaries. *Tashjian*, 479 U.S. at 210–11.

In addition to the reasons the majority provides, the district court proffered one more: Senate Bill 54 does not substantially restrict the Party's associational rights because the Party is not required

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[14] This conclusion does not entail, as the majority suggests, holding that "the rights and interests of the association extend only to the rights and interests of the party leadership." See Maj. Op. at 22. It merely entails an acknowledgment that the First Amendment protects the rights of a political party's superstructure *as well as* the rights of party members.

to become a qualified political party. In other words, the Party can operate as an unregistered political party, using whatever nomination procedures it wants. The only cost, the district court noted, would be to forfeit the ability to have its endorsements printed on the ballot. And because the Supreme Court has said the "First Amendment does not give political parties a right to have their nominees designated as such on the ballot," *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 453 n.7 (2008), the district court concluded there was little, if any, burden.

But the district court down-played that even while there may not be a constitutional right to have endorsements printed on the ballot, the "unconstitutional conditions doctrine holds that the government may not deny a benefit to a person on a basis that infringes his . . . freedom of speech" or association "even if he has no entitlement to that benefit." *Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan.* v. *Umbehr*, 518 U.S. 668, 674 (1996) (internal quotation marks and citation omitted). For if "the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly." *O'Hare Truck Serv., Inc.* v. City of Northlake, 518 U.S. 712, 717 (1996) (internal quotation marks and citation omitted).[15]

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[15] Though the Party has not expressly argued the unconstitutional conditions doctrine, the doctrine's applicability is obvious from the record.

Even though the Party may not have a right to place its endorsement on the ballot, Utah's condition on printing that endorsement—"change your party rules to better accommodate our preferred kinds of nominees or else lose your spot on the ballot"—is not a constitutional one. And given the marked electoral disadvantage for the party to go its own way, this condition may even be coercive.

The fact that the Party has the choice of being an unregistered political party, then, does not eliminate the law's serious restriction of its First Amendment freedoms.[16]

At bottom, then, none of the reasons either the majority or the district court provide rebut the conclusion that the Party bears a heavy burden under Senate Bill 54. Just because Senate Bill 54 does not engage in what the majority considers more serious intrusions (like a ban on endorsements or forcing the Party to accept nonmember voters in the primary) does not mean the burdens it does impose are not substantial. As the Supreme Court said about the law in *Jones*, Senate Bill 54 forces the Republican Party "to adulterate [its] candidate-selection process—a political party's basic function." See *Jones*, 530 U.S. at 568. When a State forces a party to radically change its candidate selection procedures in the way

[16] The district court also concluded that because the Utah Republican Party's bylaws do not expressly prohibit signature gathering, Senate Bill 54 did not much burden the Party. But this is an unreasonable interpretation of the Party's bylaws, which provide for one means of nomination and one only: the convention. Thus, when the Party asked candidates to comply with its written procedures, it necessarily excluded other paths to the nomination.

Utah does here, it places a severe associational burden on that party.

3. State Interests

Having concluded Senate Bill 54 severely burdens the Utah Republican Party's associational rights, we must determine whether Senate Bill 54 is "narrowly tailored to serve a compelling state interest." *Clingman* v. *Beaver*, 544 U.S. 581, 586 (2005). "In passing judgment" on whether the state's interests are sufficient to justify its regulation, "the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson* v. *Celebrezze*, 460 U.S. 780, 789 (1983) (emphasis added).[17]

In its brief, Utah barely made mention of interests that justify Senate Bill 54. In a single sentence, it listed "managing elections in a controlled manner, increasing voter participation, and increasing access to the ballot"—almost like an afterthought. See Aple. Br. at 34. And at oral argument, Utah simply said the State's purpose was to "strengthen democracy."[18]

Perhaps Utah thought that gesticulating at buzz-words such as "democracy" and "voter participation" would insulate the sufficiency of its interests from scrutiny. It does not. In the context of this case, Utah's

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[17] As the following discussion makes clear, I find Senate Bill 54 unconstitutional even under the more lenient *Anderson*/*Burdick* balancing test.

[18] Oral Argument at 34:10.

three purported interests are insufficient, if not illegitimate.[19]

The first in its parade of highly generalized interests—"managing elections in a controlled manner"—is almost too nondescript an interest to analyze. Utah has not claimed that elections were conducted in an "uncontrolled manner" before Senate Bill 54. Nor has it explained why the law increases the "controlled manner" of elections now. This appears instead to be a way of saying it has an interest in election regulation in general. But the state's power to regulate elections "does not justify, without more, the abridgment of fundamental rights, such as . . . the freedom of political association." *Tashjian*, 479 U.S. at 217.

Utah's second asserted interest fares worse. Not only is it insufficient; it is likely impermissible. In *Jones*, the Supreme Court held that while "increasing voter participation" is not "automatically" an illegitimate interest, courts must not evaluate that interest "in the abstract." 530 U.S. at 584. Instead, courts should ask how that value is being pursued. *Id.* The *Jones* Court therefore looked behind this generically phrased interest and found it lacking. In "the circumstances of [that] case," the state's reason

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[19] The majority cites several Supreme Court cases upholding similar state interests. See Maj. Op. at 26. But none of those cases accepted the state interests without an in-depth exploration of their reasonableness in the case at hand. See *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 191–97 (2008) (engaging in in-depth analysis of the state's proffered interests); *Clingman* v. *Beaver*, 544 U.S. 581, 593–97 (2005) (same); *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 364–68 (1997) (same).

for thinking the law would increase voter participation was that "more choices favored by the majority [but not by the party] will produce more voters." *Id.* at 584–85. That was "hardly a compelling state interest," the Court explained, "if indeed it [was] even a legitimate one." *Id.* It is one thing to protect the right to vote; it is quite another to lecture political parties because their internal processes turn off average voters. It is for elections to disclose the truth of that.

Though the state has not explained why it thinks Senate Bill 54 will increase voter participation, there are reasons to think Utah's asserted interest in "increasing voter participation" suffers from the same flaw as that in *Jones*. As recounted earlier, the advocacy group Count My Vote spearheaded the passage of this legislation, and its express purpose was to change the Party's nomination practices so that nominees would be more representative of the majority of general election voters. It believed "[p]arty delegates . . . do not represent the views of average Utahns."[20]

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[20] See Count My Vote, Why Change Utah's Election System?, http://www.countmyvoteutah.org/facts (last visited Feb. 21, 2018); see also Count My Vote, Press Release: Education Groups Endorse, Rally Behind Count My Vote, http://www.countmyvoteutah.org/education-community-endorses-rallies-behind-count-my-vote (last visited Feb. 21, 2018) (publicizing another group's endorsement, stating that "The majority of all Utah voters rank education as their highest priority, but Republican delegates are more concerned with guns, grazing, and getting the U.S. out of the United Nations"); Count My Vote, Press Release: Utahns for Ethical Government Endorses Count My Vote, http*://www.countmyvoteutah.org/utahns-for-ethical-government-endorses-count-my-vote (last visited Feb. 21, 2018)

It is uncontested that Senate Bill 54 was designed to accomplish Count My Vote's goals. At oral argument, Utah's counsel admitted that Senate Bill 54 was a "compromise" enacted to address the concerns of the Count My Vote movement.[21] As the majority explained, "it is clear from our review of the record that [Senate Bill 54] was a compromise crafted between the Utah legislature and outside interests," namely, Count My Vote. Maj. Op. at 5. Indeed, the bill's sponsor, Senator Bramble, opened his proposal by discussing Count My Vote's efforts to "increase citizen participation"—mentioning the group's appeals for the "dominant party" to change its convention rules.[22] Senator Bramble further explained that encouraging "competitive races between competing philosophies" would increase citizen participation.[23] It is likely, then, that Utah's

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(publicizing another group's endorsement, denigrating "caucuses" as "neighbor-inflicted litmus tests, to see if someone is sufficiently 'right-thinking' to be selected as a convention delegate in a problematic caucus voting process").

[21] Oral Argument at 25:00

[22] Senate Day 24, 2014 53:00, http://le.utah.gov/jsp/jdisplay/billaudio.jsp? sess=2014GS&bill=sb0054&Headers=true (last visited Feb. 22, 2018).

[23] Senator Bramble also acknowledged that Count My Vote's proposed language had been incorporated into the bill. Senate Day 24, 2014 55:00–1:00:01, http://le.utah.gov/jsp/jdisplay/billaudio.jsp?sess=2014GS&bill=sb0054&Headers= true (last visited Feb. 22, 2018). He further described certain provisions as "consistent with the original intent of the Count My Vote proponents" and "consistent with the underpinnings" of the Count My Vote movement." *Id.* A number of other senators also mentioned Count My Vote and its purposes when discussing the purposes of the bill. *Id.* at 1:00:00-1:40:00.

purpose of "increasing voter participation" is linked to Count My Vote's goal of making party nominees more representative of Utahns as a whole.

This is not a legitimate way to increase voter participation. As the Court said in *Jones*, the desire to make a party's nominees more "representative" is "nothing more than a stark repudiation of freedom of political association: Parties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not be congenial to the majority." 530 U.S. at 582. If Utahns feel they are not represented by Republican Party office holders, they are free to vote for a different party.[24] But the solution for citizen indifference cannot be to destabilize an existing party in the hopes of galvanizing citizen attention. Nor can it be to force insurgent candidates upon the party, even if they are more representative of the median voter than the candidates the party would choose for itself. And after all, insurgency cuts both ways.

As for Utah's third interest—providing more ways for persons to become party candidates—it is similarly inadequate. This asserted interest is analogous to the state's claim in *Jones* that it had an important interest in allowing nonmembers to have a voice in a party's nomination. *Id.* at 583–84. The Supreme Court

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[24] This is, in fact, already happening. See Lee Davidson, *New centrist party forms in Utah to attract disaffected Republicans, Democrats*, Salt Lake City Tribune (May, 24, 2017), http://archive.sltrib.com/article.php?id=5317869&itype=CMSID (noting that Republican and Democratic voters who feel disenfranchised have recently formed a new party in Utah).

rejected that interest because a "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." *Id.* (quoting *Tashjian*, 479 U.S. at 215–216).

The same reasoning applies here. A party member's desire to become a candidate by means other than those the party has adopted is "overborne by the countervailing and legitimate right of the party to determine its own" candidate nomination procedures. While the state may have an interest in making it easier for persons to earn a place as unaffiliated candidates on the general election ballot, it does not have a strong interest in making it easier for them to become the party's candidates on the party's primary ballot.[25]

The district court also considered a fourth possible state interest—that "[r]equiring a primary" allows the Lieutenant Governor to better perform his statutory

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[25] In deciding Utah has an interest in giving Party members "writ large" another way to gain the nomination, the majority paints party members as pitted against a separate (and even antagonistic) group of "party bosses." See Maj. Op. at 23, 25 n.15. Yet there is no reason to suppose a Great Wall between the two. Any Party member is free to become more involved in the Party's internal workings. If Party members want a signature-gathering route to nomination, they can surely rally for that change to the Party's bylaws, as is the case in many states. And as mentioned earlier, were a cabal to truly shut out the voices of ordinary members, members are free to quit, to form a new party, to cast their votes elsewhere. In the long run, there is more democratic accountability for political parties than the majority admits. The history of party presidential nomination processes demonstrates the adaptability of parties and their convention/delegate schemes.

duty to "'ensure compliance with state and federal election laws' more effectively than if nominee selection is left to a party-managed convention process." JA 1171 (quoting Utah Code Ann. § 20A-2-300.6 (2)(b)). Utah has not even mentioned this interest on appeal, perhaps acknowledging what little connection exists between preventing fraud and Senate Bill 54. Even if one accepts the district court's premise that primaries help prevent fraud, Senate Bill 54 does little to prevent fraud because it does not require a primary in every case: when a qualified political party only has candidates who emerged from its convention, the law does not require the party to participate in a primary.

To summarize, then, Utah has not shown that its "interests make it necessary to burden the plaintiff's rights." See *Anderson*, 460 U.S. at 789. It has waved its hands at generalized interests, and that cannot be enough.[26]

4. Supreme Court Case Law

In spite of the state's failure to present a cogent theory of its interests in Senate Bill 54 and the extent to which the bill harms the Party's associational rights, the majority rests its decision on generalized dicta the Supreme Court has repeated, but never examined, since the 1970's. The Court has in fact never been asked to review a state provision squarely imposing a mandatory primary on recalcitrant

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[26] Though I have applied strict scrutiny, I think the foregoing shows Utah's interests do not meet the lesser "important interests" form of scrutiny either. See *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992).

political parties. Consequently, I respectfully think this reed cannot support the weight placed upon it.

The problem lies in its inception. In 1974, in *American Party of Texas* v. *White*, a case about alleged discrimination against minority parties—not mandatory primaries, the Supreme Court said: "It is too plain for argument, and it is not contested here, that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention." 415 U.S. 767, 781 (1974). Since then, although the Supreme Court has never considered the question presented here, it has repeated variations of this dicta. See *New York State Bd. of Elections* v. *Lopez Torres*, 552 U.S. 196, 203 (2008) (addressing challenge to New York's convention system for judicial offices). As recently as *Jones*, in which the Court held California's blanket primary unconstitutional, the Court repeated the mantra. 530 U.S. at 572. It did so even as the logic of its holding cast substantial doubt on the sufficiency of states' interest in mandating a primary over a political party's objection.

These statements suggest states can alter political parties' nomination processes *to some extent*. But while it is true we are "bound by Supreme Court dicta *almost* as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements," *Gaylor* v. *United States*, 74 F.3d 214, 217 (10th Cir. 1996) (emphasis added), we generally do not follow dicta that has been completely assumed and unreasoned. See *Tokoph* v. *United States*, 774 F.3d 1300, 1303–04 (10th Cir. 2014), as amended on reh'g (Jan. 26, 2015) ("the 'dicta'

do not appear to be of the considered sort that would compel us to reach the suggested conclusion"); *United States* v. *Bd. of Cty. Commissioners of Cty. of Otero*, 843 F.3d 1208, 1214 (10th Cir. 2016), *cert. denied sub nom. Bd. of Cty. Comm'rs of Otero Cty., New Mexico* v. *United States*, 138 S. Ct. 84 (2017) (following dicta because "each statement was fully considered, went to the core of the issue under review, and was the explicit basis for the decision" (emphasis added)); see also *Cent. Virginia Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) ("For the reasons stated by Chief Justice Marshall . . . we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").

Even more significantly, as commentators have noted, an-anything-goes approach to primary election regulations is seriously at odds with the Supreme Court's internal logic in *Jones*. See, e.g., Nathaniel Persily, *Toward a Functional Defense of Political Autonomy*, 76 N.Y.U. L. Rev. 750, 785 (2001) (explaining that *Jones* follows a long line of Supreme Court cases upholding party autonomy and "the reasoning in *Jones* would extend to all types of primary systems"); Richard L. Hasen, *"Too Plain for Argument?" The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees Through Direct and Equal Primaries*, 102 Nw. U. L. Rev. 2009, 2010 (2008) (noting that "cases recognizing the parties' rights to overrule the states on the open or closed nature of political primaries" makes the status of this dicta "uncertain"). That is because one of the constitutional flaws identified in *Jones*—the alteration of the kinds of nominees a party chooses—is present in most primaries. See Samuel Issacharoff,

Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 Colum. L. Rev. 274, 274–275, 282; Pennings, *Democratizing Candidate Selection*, *supra*, at 269.

I therefore doubt the Supreme Court was laying down the law for all time in all contexts, including the intrusion mounted here by the state of Utah. At one time, perhaps, the necessity of primaries may have seemed obvious. Primaries were, as is well known, part of progressive reform to combat corruption-laced and "smoke-filled" backrooms, where party bosses supposedly ruled with autocratic quid pro quos. See *Lopez Torres*, 552 U.S. at 205–06; Diana Dwyre, *Political Parties and Campaign Finance: Challenges and Adaptations,* in The Parties Respond: Changes in American Parties and Campaigns 181, 185–86 (Mark D. Brewer & L. Sandy Maisel eds., 2013). Those were times when the party patronage system was strong, see *Elrod* v. *Burns*, 427 U.S. 347, 353 (1976) (describing this system), when parties more or less controlled candidates' publicity, Diana Owen, *Political Parties and the Media: The Parties Respond to Technological Innovation*, in The Parties Respond, *supra*, at 237, 240, and when parties held the pocketbook, Dwyre, *supra*, at 181–185.

But that power is a gone-by era. The advent of the civil service system destroyed the party spoils system. *Elrod*, 427 U.S. at 353. From broadcast television in the mid-twentieth century to social media today, the changed media environment has wrested candidate publicity from parties' hands. Marc J. Hetherington & Bruce A. Larson, Parties, Politics, and Public Policy in America 102–104, 252 (11th ed. 2010). And parties

have lost their grip on a candidate's cash. Dwyre, *supra*, at 206–07. As one commentator has put it, those "great urban machines of generations past have practically disappeared." Hetherington, *supra*, at 251. And while the "classic functions" of parties "are recruitment, nomination, and campaigning . . . today's parties no longer dominate any of these activities." *Id.* at 292. Indeed, many of these functions have been farmed out to SuperPacs only loosely affiliated with political parties. See Hetherington, *supra*, at 26, 37, 110, 136–37, 141.

At the same time, experience has called into question the Supreme Court's premise that primaries—the main democratizing device for nominations in use today—are "an ideal forum in which to resolve" intraparty "feuds." See *Eu*, 489 U.S. at 227. See generally Stephen E. Gottlieb, *Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case*, 11 Hofstra L. Rev. 191 (1982) (arguing primaries can generate disorder and undermine First Amendment rights of parties). Primaries tend to weaken party cohesiveness, alter a party's candidate mix, and change a party's political messages. Pennings, *Democratizing Candidate Selection*, *supra*, at 269, 271; Hetherington, *supra*, at 250; Issacharoff, *Private Parties with Public Purposes*, *supra*, at 274. Primaries have not, moreover, lived up to their hype of equalizing the playing field among candidates and increasing voter engagement. Evidence suggests primaries do almost nothing to weaken incumbent advantage. Hetherington, *supra*, at 79–80. And as for increasing voter participation in the nomination process,

primaries have been a dud. Turnout for primary elections is consistently dismal. *Id.*

This new context matters. The whole premise of the *Anderson*/*Burdick* test is to balance the associational burdens placed on political parties with a state's interest in maintaining "fair and honest" elections. See *Burdick*, 504 U.S. at 433 (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974)). The much-reduced power parties wield in today's world suggests the burden of interference with their ability to nominate the candidate of their choice is greater and the state's interest in interfering is far lower than it was at an earlier time.

When circumstances have changed so drastically, it is not enough to rely on the fact that the Supreme Court once assumed the First Amendment balance clearly favored the state. In these as-applied challenges, we must evaluate the associational burden in light of facts on the ground. That is how we typically approach election law-related challenges and other First Amendment cases.

When aspiring candidates challenge the requirements they face to be listed on the ballot, for example, we do not look at whether a variant of that isolated provision was held constitutional in 1950, 1990, or even last year. Rather, "to assess realistically whether the law imposes excessively burdensome requirements . . . it is necessary to know other critical facts." See *Storer* v. *Brown*, 415 U.S. 724, 738 (1974). We thus look to whether the entire election mechanism, in its "totality," unduly impairs a person's ability to become a candidate. *Arutunoff* v. *Oklahoma State Election Bd.*, 687 F.2d 1375, 1379 (10th Cir.

1982). The Supreme Court has looked, for instance, to whether it is feasible, on the ground, for candidates to collect the number of signatures a state requires for a place on the ballot. See *American Party of Tex.* v. *White*, 415 U.S. 767, 786–87 (1974) ("Given that time span, signatures would have to be obtained only at . . . four signatures per day for each 100 canvassers . . . Hard work and sacrifice by dedicated volunteers are the lifeblood of any political organization. Constitutional adjudication and common sense are not at war with each other . . . .").

Similarly, when evaluating time, place, and manner restrictions on speech, we do not focus solely on the prohibition at issue. We look at whether there are "ample alternative channels for communication." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Simply put, we assess how burdensome the regulation really is in the real world.

Consider the Supreme Court's explicit holding in a facial challenge to Indiana's voter identification law. *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 185–89 (2008). The Court found that Indiana had sufficiently alleged state interests in ballot integrity that outweighed competing burdens on the right to vote. *Id.* at 191–97, 202–203. The Court held the "'precise interests' advanced by the State [were] therefore sufficient to defeat petitioners' facial challenge to" the law. *Id.* at 203. Yet despite this clear statement, when confronted with as-applied challenges, lower courts have had no problem

reassessing the severity of the burden on voters based on real world evidence.[27] The same is true here.

And attention to facts on the ground is especially important when we are dealing with the associational rights of political parties. Parties are an indispensable part of our democracy, having come into being almost immediately after the creation of the republic. *Jones*, 530 U.S. at 574. "Representative democracy in any populous unit of governance is unimaginable" without parties. *Id.* Indeed, no large democracy has been able to operate without them. Nicol C. Rae, *The Diminishing Oddness of American Political Parties, in The Parties Respond*, *sup3ra*, at 25, 25. Parties perform the essential task of aggregating disparate interests into digestible options on the ballot. By doing so they provide an important heuristic for voters and reduce costs for legislators to organize around policies. Persily, *The Legal Status of Political Parties*, *supra*, at 787. And by brokering between the varied interests

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[27] See *N. Carolina State Conference of NAACP* v. *McCrory*, 831 F.3d 204, 214, 232 (4th Cir. 2016), cert. denied sub nom. *North Carolina* v. *N. Carolina State Conference of NAACP*, 137 S. Ct. 1399 (2017) (holding voter ID law unconstitutional in light of the record in that case); *Veasey* v. *Perry*, 71 F. Supp. 3d 627, 679, 707 (S.D. Tex. 2014), vacated in part on other grounds, *Veasey* v. *Abbott*, 796 F.3d 487 (5th Cir. 2015), *on reh'g en banc*, 830 F.3d 216 (5th Cir. 2016), *and aff'd in part, vacated in part, rev'd in part sub nom. Veasey* v. *Abbott*, 830 F.3d 216 (5th Cir. 2016) (holding voter ID law unconstitutional because there were "substantial differences in the evidentiary record" making Crawford's holding inapplicable); *Frank* v. *Walker*, 17 F. Supp. 3d 837, 845, 863 (E.D. Wis.), *rev'd*, 768 F.3d 744 (7th Cir. 2014) (the district court held voter ID law unconstitutional because the record was different from that in *Crawford* but was reversed on the grounds that the record in *Crawford* was too similar).

in the coalition, parties make it possible for a large number of interests—especially minorities—to have a voice. See *id.*

As Justice O'Connor explained in her concurrence in *Davis* v. *Bandemer*, "[t]here can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government." 478 U.S. 109, 144–45 (1986). "The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change." *Id.*

In light of the important function political parties serve in our Republic, we should be wary of burdens on their associational rights at a time when they are, in many respects, already weakening. In most states, it is true, the major political parties still favor the primary election. Persily, *Toward a Functional Defense of Political Autonomy*, *supra*, at 786. But the case for the constitutionality of forcing political parties to engage in selection-by-primary against their will is, today, far more suspect. Indeed, mandatory primaries are anomalous among the world's democracies, and have not, despite the oft-repeated myth, resulted in what most reformers intended.[28] Under these circumstances, we should not rely on conclusory assertions. If we permit the kind of

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[28] See Richard Pildes, Two Myths About the Unruly American Primary System, Washington Post (May 25, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/25/two-myths-about-the-unruly-american-primary-system/?utm_term=.b06a00d53dc6.

associational degradation Senate Bill 54 effects on parties, we may find instead of "stability," populism, and instead of "measured change," extremism.

I would therefore hold Senate Bill 54's primary provisions unconstitutional.

C. The Signature-Gathering Provision

The Utah Republican Party also claims the number of signatures Senate Bill 54 requires qualified political party members to collect to become candidates for the State House or Senate are unconstitutionally burdensome. Because the majority holds the rest of Senate Bill 54 is constitutional, it also decides this question. I agree with the majority that, if the rest of the scheme is constitutional, the quantities of signatures required are not unconstitutional.

The Utah Republican Party argues the percentage of eligible signers a candidate must obtain signatures from for State House and Senate far exceeds the five-percent "safe harbor" under *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971). See also Storer, 415 U.S. at 739. The number of signatures required—1,000 for State House, 2,000 for State Senate—range from 6% to 57% of the eligible signers in each district.[29]

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[29] These high figures are the result of the first lawsuit. Senate Bill 54 used to allow unaffiliated voters to sign candidacy petitions. When the district court held that provision unconstitutional, the Utah Republican Party chose only to allow its own members to sign petitions, drastically reducing the number of eligible signers in each district. This does not affect the outcome one way or the other. See *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 187 (1979) ("Historical accident, without more, cannot constitute a

But these percentages are not the end of our analysis. The Supreme Court's "ballot access cases . . . focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process." *Clements* v. *Fashing*, 457 U.S. 957, 964 (1982). "The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity." *Id.* (internal quotation marks and citation omitted).

Accordingly, we look at the "the practical effect of the election laws of a given state, viewed in their totality." *Arutunoff* v. *Oklahoma State Election Bd.*, 687 F.2d 1375, 1379 (10th Cir. 1982). This "totality" approach is in agreement with the Second Circuit's approach in *LaRouche* v. *Kezer*, 990 F.2d 36 (2d Cir. 1993). When there is a constitutional method of becoming a candidate on the ballot, an additional method—even if difficult to use—is not unconstitutional unless it is irrational. See *id.* at 38–39 & n.1.

Senate Bill 54 provides two paths for a qualified political party member to obtain a place on the primary ballot. One is the party convention. The other is signature-gathering. Because all agree that the convention method is constitutional on its own, the signature-gathering route only increases the ways a candidate can earn a slot on the ballot. Accordingly, even if it is difficult to use, it does not unfairly burden political opportunity.

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compelling state interest.").

Contrary to the Utah Republican Party's contention, there is also no indication that the numbers chosen are irrational. The state might think that one or two thousand supporters is in itself a "significant modicum of support" meriting a candidate's placement on the ballot, regardless of the percentage of eligible signers it represents. See *Jenness*, 403 U.S. at 442. Or the state may want to incentivize use of the party convention for State House and Senate candidacies. Either way, the signature-gathering requirements do not violate the Constitution.[30]

III. Conclusion

Senate Bill 54 attempts to change the substance of the Utah Republican Party under the guise of the state's authority to regulate electoral procedure. Like California in *Jones*, Utah had the "intended outcome" of "changing the [Party's] message" and "favor[ing] nominees with 'moderate' positions." See *Jones*, 530 U.S. at 580–82. There is "no heavier burden on a political party's associational freedom." *Id.*

In contrast to these heavy burdens, the State's asserted interests are vague and even impermissible. Utah alleged no evidence of corruption or fraud. And this is not a case in which the Party has disenfranchised some protected segment of the citizenry in its processes. See, *e.g.*, *Smith* v. *Allwright*, 321 U.S. 649, 650 (1944). To the contrary, the Party uses a convention system that gathers delegates from

[30] The foregoing analysis does not, however, foreclose an as-applied equal protection or due process challenge by an aspiring candidate disadvantaged by these signature-gathering requirements.

around the state who are chosen at caucus meetings open to all of the public without any qualification other than Party membership.

The background of this case should caution us as to the perils of allowing states to impose procedural changes of this magnitude on unwilling political parties. After the Utah Republican Party repeatedly rebuffed requests to change its nomination procedures, the unsuccessful reformers simply went to the state legislature and changed the Party's procedures by force of law. Allowing this collateral attack on party rules to be a run-of-the-mill part of the political process invites leaders "to enlist and rely on state law as the primary vehicle for party governance, largely relieving these leaders of any need to secure the support or acquiescence of party members to a chosen course." See Ellen D. Katz, *Barack Obama, Margarita Lopez Torres, and the Path to Nomination*, 8 Election L. J. 369, 379 (2009).

Perhaps it would be wise for the Utah Republican Party to change its nomination procedures. And maybe it will. Parties are not impervious to change. Change happens to parties constantly, sometimes from within and sometimes from without. But such change is not for legislatures to impose. At least not unless they have clearly spelled out, compelling interests.

For the foregoing reasons, I respectfully dissent with respect to the Either or Both and mandatory primary scheme and concur with respect to the signature- gathering provision.

United States Court of Appeals for the Tenth Circuit

Utah Republican Party, Utah Democratic Party v. Spencer J. Cox

No. 16-4091, 16-4098
(D.C. No. 2:16-CV-00038-DN)
(D. Utah)

ORDER

Before **TYMKOVICH**, Chief Judge, **EBEL**, and **LUCERO**, Circuit Judges.

These matters are before the court on the *Utah Republican Party's Petition for Rehearing or Rehearing En Banc.* We also have a response from the appellee and, per the court's order dated May 30, 2018, a reply in support. In addition, we have also considered the amicus curiae brief of the Institute for Free Speech and we direct the clerk to file that brief formally effective the date of this order. *See* 10th Cir. R. 29.1.

Upon consideration of all the materials, the request for panel rehearing is denied. A panel majority has, however, concluded that a minor and *sua sponte* amendment of the decision is appropriate.

he opinion is, therefore, revised to add a footnote to page 47. The opinion is otherwise unchanged. The clerk is directed to file the attached revised version *nunc pro tunc* to the original filing date of March 20, 2018.

The appellant's *Petition*, as well as the response, reply, and amicus curiae brief, were also circulated to all the active judges of the court who are not disqualified. *See* Fed. R. App. P. 35(a). As no judge on the original panel or the en banc court requested that a poll be called, that part of the *Petition* seeking en banc reconsideration is likewise denied.

Chief Judge Tymkovich has written separately to concur in the denial of en banc rehearing.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

16-4091 & 16-4098, *Utah Republican Party & Utah Democratic Party v. Cox*

TYMKOVICH, C.J., concurring in denial of rehearing en banc.

I concur in the court's denial of rehearing en banc. The majority and dissent clearly laid out the dueling arguments.

I write separately to note the issues raised here deserve the Supreme Court's attention. The panel majority pledges continued faith in an oft-repeated strand of Supreme Court dicta which, as my dissent argues, has outlived its reliability. At this point, the Supreme Court's homage to State regulation of the primary election process is little more than a nod to received wisdom. *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 572 (2000); *see, e.g.*, *American Party of Tex.* v. *White*, 415 U.S. 767, 781 (1974).

Yet circumstances are much changed. Recent Supreme Court cases like *California Democratic Party* v. *Jones* suggest this dicta does not provide the whole truth. So too, do facts on the ground. The behemoth, corrupt party machines we imagine to have caused the progressive era's turn to primaries are now, in many respects, out of commission. In important ways, the party system is the weakest it has ever been—a sobering reality given parties' importance to our republic's stability. And given new evidence of the substantial associational burdens, even distortions, caused by forcibly expanding a party's nomination process, a closer look seems in order. The time appears ripe for the Court to reconsider (or rather, as I see it, consider

for the first time) the scope of government regulation of political party primaries and the attendant harms to associational rights and substantive ends.

In the United States District Court for the District of Utah, Central Division	
Utah Republican Party, Utah Democratic Party, v. Spencer J. Cox,	Memorandum Decision and Order • Denying [37] Motion for Judgment on the Pleadings; • Denying [38] Motion for Judgment on the Pleadings; • Denying [41] Motion for Partial Summary Judgment; and • Entering Partial Summary Judgment Case No. 2:16-cv-00038-DN District Judge David Nuffer

The Utah Republican Party ("URP") claims in subparagraphs 73(b) through (g) of its Complaint[1] (mirrored in subparagraphs 79(a) through (f) of that Complaint) that the State of Utah may not require it to permit its members to seek a place on the primary election ballot through gathering signatures. The URP argued first that the plain language of the Either

[1] Complaint ("URP Complaint") ¶ 73, docket no. 2, filed Jan. 15, 2016.

or Both Provision[2] did not require the URP to allow members the option of gathering signatures, but this argument was rejected by the Utah Supreme Court.[3] The URP also argues that by leaving the choice of paths to the primary election ballot in the hands of party members, the statute is unconstitutional because it abridges the rights of the party.[4]

This Memorandum Decision and Order concludes that the Either or Both Provision, which, as interpreted by the Utah Supreme Court, allows URP members to choose to access the primary election ballot by either signature gathering, or through Utah's more traditional caucus and convention route, or both, does not impair the URP's constitutional rights but is a legitimate exercise of the state's power to regulate elections.

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[3] *Utah Republican Party* v. *Cox*, 2016 UT 17, ¶ 5

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PENDING MOTIONS

The URP moves for partial summary judgment on subparagraphs 73(b) through (g) of its Complaint ("41 URP MPSJ").[5] Paragraph 73 of the Complaint asserts that:

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[5] Utah Republican Party's Motion for Partial Summary Judgment on Subparagraphs 73(b)-(g) ("41 URP MPSJ"), docket no. 41, filed Feb. 17, 2016.

73. The Party is entitled to a declaratory judgment establishing the unconstitutionality of the SB54 set forth above as applied to the manner in which

a. the State has taken a different position from that taken in the First Lawsuit, that the Party relied on in terminating prior litigation;

b. the State has taken away and misappropriated the Party's right to certify and endorse its nominees for elected office;

c. the State has taken away and misappropriated the Party's right to communicate its endorsement on the general election ballot and to control the use of its name and emblem on the ballot;

d. the State has taken away and misappropriated the Party's right to determine for itself the candidate selection process that will produce a nominee who best represents the Party's political platform;

e. burdened the Party's associational rights by mandating changes to the Party's internal rules and procedures, at the threat of depriving the Party of its rights if it refuses to comply, that disadvantage the Party, and that the Party has rejected and that conflict with the rules the Party has determined for itself, as set forth in its Constitution and Bylaws, will produce

a nominee who best represents the Party's political platform;

f. burdened the Party's associational rights, and the rights of disassociation, by imposing upon the Party a nominee who may not necessarily be a Party member and without guaranteeing that nominee has been selected by a majority of Party members participating in the primary election;

g. burdened the Party's associational rights and rights to free speech, by taking away the Party's right to have its nominees commit themselves to the Party Platform "as the standard by which my performance as a candidate and as an officeholder should be evaluated," and replacing it with a process that requires only that candidates gather signatures;

h. burdened the Party's associational rights, and the rights of disassociation, by taking away the Party's convention system as its preferred way of selecting nominees and allowing a party to designate candidates in the primary election by convention only if it agrees to open that primary election, that the State now mandates, to persons unaffiliated with the Party;

i. burdened the Party's associational rights and the rights of disassociation, by imposing on candidates seeking the Party's nomination onerous signature

gathering requirements beyond those ever allowed by the United States Supreme Court, and thus unconstitutionally burdens the Party's rights;

j. burdened the rights of the Party and its members by imposing on them signature-gathering requirements beyond those ever allowed by law; and

k. otherwise burdening the Party's rights of association, or depriving it of its rights of disassociation, free speech and due process as set forth above.[6]

Summary judgment was previously granted in favor of the Lieutenant Governor ("LG") with respect to subparagraphs 73(a), (i), and (j).[7] That order rejected the URP claims that the numeric signature requirements rendered the signature gathering path unconstitutional. Also, the URP acknowledged in a hearing on February 4, 2016 that subparagraph 73(h) was not at issue because it was resolved in the First Lawsuit.[8] Further, subparagraph 73(k) is a "catch-all"

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[6] URP Complaint ¶ 73.

[7] See Memorandum Decision and Order Denying in Part [37] Motion for Judgment on the Pleadings; Denying in Part [38] Motion for Judgment on the Pleadings; Denying [39] Motion for Partial Summary Judgment; Granting Summary Judgment under Rule 56(f) for the LG and against the URP; and Granting Leave to the UDP to File an Amended Complaint ("75 Order"), docket no. 75, filed Apr. 6, 2016.

[8] *Utah Republican Party et al.* v*. Herbert et al.*, Case No. 2:14-cv-00876-DN-DBP ("First Lawsuit"). Summary judgment was previously granted in favor of the Lieutenant Governor ("LG")

which does not raise new subject matter that is not already alleged in the previous subparagraphs. Thus, this Memorandum Decision and Order resolves subparagraphs 73(b) through (g), the only remaining URP claims in its first cause of action and the only subparagraphs raised in the 41 URP MPSJ. The LG and the Utah Democratic Party ("UDP") oppose the 41 URP MPSJ ("LG Opposition" and "UDP Opposition" respectively).[9] For the reasons stated below, the 41 URP MPSJ is DENIED.

Furthermore, since proper notice has been given under Rule 56(f)[10] that summary judgment may be granted for the LG as to the issues raised in the 41 URP MPSJ,[11] and the parties have had the opportunity to file responses to that notice,[12] summary

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with respect to subparagraphs 73(a), (i), and (j). See 75 Order at 42. Also, the URP acknowledged in a hearing on February 4, 2016 that subparagraph 73(h) was not at issue because it was resolved in the First Lawsuit. Transcript of Status Conference (Feb. 4, 2016) ("Feb. 4 Tr.") at 23, docket no. 42, filed Feb. 18, 2016.

[9] Defendant's Memorandum in Opposition to Utah Republican Party's Motion for Partial Summary Judgment on Subparagraphs 73(b)-(g) ("LG Opposition"), docket no. 49, filed Feb. 24, 2016; Utah Democratic Party's Response to Utah Republican Party's Motion for Partial Summary Judgment on Subparagraphs 73(b)-(g) ("UDP Opposition"), docket no. 51, filed Feb. 24, 2016.

[10] Fed. R. Civ. P. 56(f).

[11] Notice from the Court, docket no. 76, entered Apr. 11, 2016.

[12] The UDP was the only party to file a response to the Rule 56(f) notice. Utah Democratic Party's Response to Rule 56(f) Notice Regarding Utah Republican Party's Motion for Partial Summary Judgment on Subparagraphs 73(b)-(g), docket no. 81, filed Apr. 14, 2016.

judgment is granted in favor of the LG and against the URP as to the issues raised in the 41 URP MPSJ. Specifically, summary judgment is GRANTED in favor of the LG and against the URP with respect to subparagraphs 73(b) through (g). Further, declaratory judgment is entered that Utah Code 20A- 9-101(12)(d) ("Either or Both Provision") is a valid exercise of the state's power to regulate elections. The Either or Both Provision, by allowing a URP member candidate to gather signatures to obtain access to the URP primary election ballot, imposes a permissible burden on the URP and fulfills the stated purposes of the statute.[13] Those purposes are to manage elections in a controlled manner, increase voter participation, and increase access to the ballot.[14]

Importantly, it is *not* the *state* that decides which candidates will be placed on the general election ballot; rather, *only those voters who the URP allows to vote in the URP primary* can make that decision. In the 2016 election, only members of the URP are allowed to vote in the URP primary, so the members of the URP—and the members of the URP alone—will decide who represents the URP on the general election ballot. Historically, delegates of the URP often made that decision. Under the state's new election

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[13] See *Greenville County Republican Party Executive Committee v. South Carolina*, 824 F. Supp. 2d 655, 662 (D.S.C. Mar. 30, 2011) (stating that burdens may be necessarily imposed on political parties in order to advance legitimate state interests).

[14] Utah Code 20A-9-401 ("This part shall be construed liberally so as to ensure full opportunity for persons to become candidates and for voters to express their choice."); Utah Code 20A-2-300.6 (stating that the LG is "Utah's chief elections officer" and shall "ensure compliance with state and federal election laws").

processes, delegates share that decision with other members of the URP. While the URP claims this is a "severe" burden on the URP's rights of association and disassociation, the URP is incorrect. The burden imposed is a reasonable regulation that accomplishes the objectives of the statute.

Additionally, the LG and the UDP have moved for judgment on the pleadings.[15] The UDP's motion for judgment on the pleadings ("37 UDP MJP") and the LG's motion for judgment on the pleadings ("38 LG MJP") were previously denied in part.[16] For the reasons stated below, the remaining portions of the 37 UDP MJP and the 38 LG MJP are DENIED.

STANDARD FOR JUDGMENT ON THE PLEADINGS

A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is evaluated by the same standard as a Rule 12(b)(6) motion to dismiss for failure to state a claim.[17] The factual record for such a motion is the text of the challenged pleading. The factual details supporting a claim must be great enough to make the claim plausible, rather than merely possible. That is, the factual details must be "enough to raise a right to

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[15] Utah Democratic Party's Motion for Judgment on the Pleadings and Memorandum in Support Thereof ("37 UDP MJP"), docket no. 37, filed Feb. 12, 2016; Defendant's Motion for Judgment on the Pleadings and Memorandum in Support ("38 LG MJP"), docket no. 38, filed Feb. 12, 2016.

[16] See 75 Order at 40-42.

[17] See, e.g., *Myers* v. *Koopman*, 738 F.3d 1190, 1193 (10th Cir. 2013); Fed. R. Civ. P. 12(c); Fed. R. Civ. P. 12(b)(6).

relief a+bove the speculative level …"[18] It must be reasonable for a court to draw the inference that the defendant is liable, based on the facts stated.[19] Recitations of elements of a claim and conclusory statements lack sufficient detail, and cannot trigger a court's assumption that all of the statements made in the pleading are true.[20]

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[21] A factual dispute is genuine when "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way."[22] In determining whether there is a genuine dispute as to material fact, the court should "view the factual record and draw all reasonable inferences therefrom most favorably to the nonmovant."[23]

The moving party "bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law."[24] The factual record for

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[18] *Bell Atlantic* v. *Twombly*, 550 U.S. 544, 545 (2007).

[19] See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 663 (2009).

[20] *Id.*

[21] Fed. R. Civ. P. 56(a).

[22] *Adler* v. *Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998).

[23] *Id.*

[24] *Id.* at 670-671.

a motion for summary judgment is the undisputed material facts derived from the parties' briefing. The following Undisputed Material Facts are derived from the 41 URP MPSJ, the LG Opposition, the UDP Opposition, and the portions of the record cited in that briefing. In its Reply, the URP did not respond to any statements of fact.[25] The Undisputed Material Facts which come from the First Lawsuit history, from the statutes, and from the Complaint in this lawsuit are considered in the 37 UDP MJP and the 38 LG MJP.

UNDISPUTED MATERIAL FACTS

The First Lawsuit

In December 2014, the URP filed the First Lawsuit against the Governor and the LG of the State of Utah (collectively "State Defendants"). The First Lawsuit concerned the constitutionality of Senate Bill 54 ("SB54"). SB54 was enacted in 2014 by the Utah State Legislature to modify the Utah Election Code provisions regarding the nomination of candidates, primary and general elections, and ballots. Specifically, the URP claimed that it was entitled to a declaratory judgment and injunctive relief under the First and Fourteenth Amendments of the United States Constitution with respect to the manner in which the State Defendants, through SB54, had:

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[25] Reply Memorandum in Support of Utah Republican Party's Motion for Partial Summary Judgment on Subparagraphs 73(b)-(g) ("URP Reply"), docket no. 57, filed Feb. 29, 2016.

a. taken away and misappropriated the Party's right to certify and endorse its nominees for elected office;

b. taken away and misappropriated the Party's right to communicate its endorsement on the general election ballot and to control the use of its name and emblem on the ballot;

c. taken away and misappropriated the Party's right to determine for itself the candidate selection process that will produce a nominee who best represents the Party's political platform;

d. burdened the Party's associational rights by mandating changes to the Party's internal rules and procedures, at the threat of depriving the Party of its rights if it refuses to comply, that disadvantage the Party, and that the Party has rejected and that conflict with the rules the Party has determined for itself, as set forth in its Constitution and Bylaws, will produce a nominee who best represents the Party's political platform;

e. burdened the Party's associational rights, and the rights of disassociation, by imposing upon the Party a nominee who may not necessarily be a Party member and without guaranteeing that nominee has been selected by a majority of Party members participating in the primary election;

f. burdened the Party's associational rights and rights to free speech, by taking away the

> Party's right to have its nominees commit themselves to the Party Platform "as the standard by which my performance as a candidate and as an officeholder should be evaluated," and replacing it with a process that requires only that candidates gather signatures; and
>
> g. burdened the Party's associational rights, and the rights of disassociation, by taking away the Party's convention system as its preferred way of selecting nominees and allowing a party to designate candidates in the primary election by convention only if it agrees to open that primary election, that the State now mandates, to persons unaffiliated with the Party; and
>
> h. otherwise burden[ed] the Party's rights of association, or depriving it of its rights of disassociation, free speech and due process as set forth above.[26]

The Constitution Party of Utah ("CPU") was permitted to intervene in the First Lawsuit and asserted similar claims against the State

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[26] Complaint ("URP Complaint 1") ¶ 110, ECF No. 2 in First Lawsuit, filed Dec. 1, 2014. The URP also asserted trademark infringement claims in the First Lawsuit, but the trademark claims are not relevant to the current issues in question. See also 41 URP MPSJ at 5, ¶ 2 (citing URP Complaint 1 ¶¶ 110(e)-112 and 41 (Prayer)). Undisputed by the LG. LG Opposition at xii, ¶ 2. UDP does not dispute these allegations were made in the First Lawsuit. UDP Opposition at 5-6, ¶ 2(a).

Defendants.[27] The CPU specifically challenged the constitutionality of the nominating petition signature gathering requirements set forth in Utah Code 20A-9-408 ("Signature Gathering Provision").[28] The CPU contended that SB54 was unconstitutional because the "signature gathering processes are a severe burden on CPU's associational rights."[29] The Signature Gathering Provision permits a candidate to appear on a party's primary ballot by gathering a specified percentage or number of signatures from persons who are qualified to vote in that party's primary.[30]

The URP sought a preliminary injunction in the First Lawsuit to stay the enforcement or implementation of SB54.[31] After the URP's motion for

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[27] Complaint ("CPU Complaint"), ECF No. 27 in First Lawsuit, filed Jan. 27, 2015.

[28] Motion for Partial Summary Judgment and Memorandum in Support at 15, ECF No. 163 in First Lawsuit, filed Sep. 21, 2015.

[29] Reply Memorandum in Support of Plaintiff Constitution Party of Utah's Motion for Partial Summary Judgment at 13, ECF No. 188 in First Lawsuit, filed Oct. 19, 2015.

[30] See, *e.g.* Utah Code 20A-9-408(8)(b)(ii) (allowing candidate to appear on ballot for "a congressional district race" if the candidate collects "7,000 signatures of registered voters who are residents of the congressional district and are permitted by the qualified political party to vote for the qualified political party's candidates in a primary election"). All citations to the Utah Code are to the 2015 edition unless otherwise noted.

[31] 41 URP MPSJ at 5, ¶ 3 (citing Plaintiff's Motion for a Preliminary Injunction, ECF No. 12 in First Lawsuit, filed Jan. 1, 2015; Plaintiff's Amended Motion for a Preliminary Injunction, ECF No. 13 in First Lawsuit, filed Jan. 5, 2015). Undisputed by the LG. LG Opposition at xiii, ¶ 3. UDP denies this fact, UDP Opposition at 6, ¶ 3(a), but UDP's denial is unfounded. There can

preliminary injunction was filed, the Utah Legislature enacted Senate Bill 207 ("SB207"), amending SB54 to clarify that anyone seeking the nomination of a political party must be a registered member of that party.[32]

The URP's motion for preliminary injunction was denied.[33] The Order Denying Preliminary Injunction rejected the URP's claims that SB54 restricted its ability to endorse the candidates of its choice and to regulate the URP's internal affairs free from state influence, concluding: "[s]ignificantly, under SB54, the State does not dictate who is allowed to be a member of a political party," that "state law allows all political parties to define membership in accordance with party rules," and that "SB207 eliminate[d] the [URP]'s concern that its nominees may not be members of the Republican Party" because "a candidate may not file a declaration of candidacy for a political party of which the candidate is not a member, except to the extent that the political party permits

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be no *genuine* dispute that the URP's motion for preliminary injunction in the First Lawsuit sought to stay the enforcement of SB54.

[32] 41 URP MPSJ at 6, ¶ 7 (citing Notice of Senate Bill 207 Signed by Governor Herbert, ECF No. 66 in First Lawsuit, filed Mar. 31, 2015). The LG disputes that SB207 was not enacted "in response to the [URP]'s allegations" in the First Lawsuit. LG Opposition at xiii, ¶ 7. UDP disputes that SB207 speaks for itself. UDP Opposition at 7, ¶ 7(a). This statement of fact omits the suggestion that SB207 was enacted in response to the URP's allegations.

[33] Memorandum Decision and Order Denying Preliminary Injunction ("Order Denying Preliminary Injunction"), ECF No. 170 in First Lawsuit, entered Sep. 24, 2015.

otherwise in the political party's bylaws."[34] The Order Denying Preliminary Injunction noted that none of the burdens URP alleged were "severe," except one, which was not ripe for a challenge:

> **[N]one of the asserted burdens are severe except one,** which is not ripe for review since the evidence now presented by the Party cannot sustain an as-applied challenge to the QPP path of SB54.[35]

The Order Denying Preliminary Injunction explained Utah Code 20A-9-101(12)(a) was potentially unconstitutional.[36] This subsection forced a political party to allow unaffiliated voters into the party's primary election in order to be considered a "qualified political party" ("QPP"). Subsection (12)(a) was referred to as the "Unaffiliated Voter Provision." The Order Denying Preliminary Injunction explained that the unaffiliated voter issue was not ripe at the preliminary injunction stage because the URP had not

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[34] 41 URP MPSJ at 8, ¶ 19 (citing Order Denying Preliminary Injunction at 19-20). Undisputed by the LG. LG Opposition at xviii, ¶ 19. UDP disputes this statement of fact, arguing that the Order Denying Preliminary Injunction speaks for itself. UDP Opposition at 12, ¶ 19(a). The UDP is correct that the Order Denying Preliminary Injunction speaks for itself and that it makes additional statements not included in this statement of fact. But the quoted statements from the Order Denying Preliminary Injunction are accurate and cannot be genuinely disputed. See Order Denying Preliminary Injunction at 19-20.

[35] Order Denying Preliminary Injunction at 15 (emphasis added).

[36] *Id.* at 20.

yet chosen to become a QPP.[37] All other asserted burdens were rejected. The Order Denying Preliminary Injunction made the following conclusions:

> *Requiring Primary Election*
>
> [T]he State can constitutionally require the Party to select its candidates through a primary election and the State can lawfully certify the Party's candidates who receive the most votes in the primary election as the candidates to appear on the general election ballot.[38]
>
> *Use of Party's Symbol on the General Election Ballot*
>
> [T]here is no protected free speech right to communicate the Party's endorsement on the general election ballot..... The Party may still hold a convention,
>
> campaign for candidates, fundraise, and endorse any candidate the Party chooses to support.[39]
>
> *Interference with Internal Structure of Party*
>
> SB54 does not prevent the Party from holding neighborhood caucus meetings and conducting those meetings as the Party chooses. Moreover,

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[37] *Id.* at 31.

[38] *Id.* at 17.

[39] *Id.*

> not all regulation of a party's internal processes is prohibited or constitutionally questionable.[40]
> . . .
>
> Moreover, SB207 [a bill enacted in 2015 by the Utah Legislature] eliminates the Party's concern that its nominees may not be members of the Republican Party. . .
>
> . Thus, the Party's concern that its nominees will not be members of the Party is unfounded.[41]
>
> *Plurality*
>
> The Party accurately identifies the possibility that, under the provisions of SB54, its nominee may be elected by a plurality, as opposed to a majority, of its members. However, the Party presented no legal authority indicating that there is any constitutional deficiency in a party's candidate gaining access to the general election ballot based on a plurality vote from a primary election.[42]

Thus, the only potentially "severe" burden identified in the First Lawsuit was the Unaffiliated Voter Provision because it *forced* a QPP to allow unaffiliated voters in the QPP's primary election.

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[40] *Id.* at 18.

[41] *Id.* at 20.

[42] *Id.*

Under SB54, political parties desiring to have candidates featured with party affiliation on the upcoming general election ballot must file a statement with the LG to proceed as a "registered political party" ("RPP") or a QPP.[43] On or about August 18, 2015, the URP sent a letter to the LG's office designating itself a QPP in the 2016 election cycle. The letter stated:

> Pursuant to Utah Code Ann. § 20A-9-101(12)(e), the Utah Republican Party certifies its intent to nominate candidates in 2016 in accordance with its internal rules and procedures and Utah Code Ann. § 20A-9-406. This is without prejudice to the positions the party has asserted in the matter *Utah*

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[43] 41 URP MPSJ at 7, ¶ 14 (citing Deposition Transcript of Mark J. Thomas (Mar. 20, 2015) ("Thomas Dep.") at 100:15-103:16, ECF No. 69-3 in First Lawsuit, filed Apr. 1, 2015). Undisputed by the LG. LG Opposition at xvi, ¶ 14. UDP disputes this fact, arguing that URP did not cite to any provision of state law to support it. UDP Opposition at 9-10, ¶ 14(a). UDP is correct that URP did not cite any provision of state law to support this proposition, but the UDP is incorrect that state law does not support it. See Utah Code 20A-9-101(12)(e) (requiring political party to certify to the LG by September 30 whether the party will nominate candidates in accordance with Utah Code 20A-9-406 (Qualified political party – Requirements and exemptions)); Utah Code 20A-9-403(1) and (2) (requiring political party to declare its intent to participate in the next general election if it wishes to have its candidates appear on the general election ballot with party affiliation). A comprehensive explanation of the QPP/RPP path distinction is included in the Memorandum Decision and Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment [162] and Granting in Part and Denying in Part Constitution Party of Utah's Motion for Partial Summary Judgment [163] ("First Lawsuit Summary Judgment Order"), ECF No. 207 in First Lawsuit, entered Nov. 3, 2015. It will not be repeated here.

> *Republican Party v. Herbert, et al.*, Case No. 2:14-cv-876 (D. Utah), challenging the constitutionality of recent amendments to the Utah Election Code.[44]

Later in the First Lawsuit, the State Defendants and the CPU brought separate motions for summary judgment.[45] The central issue in those motions was whether the Unaffiliated Voter Provision was unconstitutional.[46] The CPU argued it was unconstitutional because it forced QPPs to allow unaffiliated voters to vote in the QPP's primary election, thus imposing a "severe" burden, and the State did not have a compelling state interest to justify the burden imposed. The State argued the Unaffiliated Voter Provision was constitutionally sound.

On October 27, 2015, a hearing was held regarding the CPU's and the State Defendants' motions for summary judgment. Discussion was held on the Unaffiliated Voter Provision and other topics,

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[44] 41 URP MPSJ at 9-10, ¶ 25 (citing Letter from URP Chairman James Evans to Lt. Gov. Office (Aug. 17, 2015), ECF No. 168-4 in First Lawsuit, filed Sep. 23, 2015). Undisputed by LG. LG Opposition at xxi, ¶ 25. Undisputed by UDP. UDP Opposition at 15, ¶ 15(a).

[45] Defendants' Motion for Summary Judgment and Memorandum in Support, ECF No. 162 in First Lawsuit, filed Sep. 21, 2015; Motion for Partial Summary Judgment and Memorandum in Support, ECF No. 163 in First Lawsuit, filed Sep. 21, 2015. The URP also filed a motion for summary judgment, but it was stricken. Order Striking [167] Motion for Summary Judgment and [168] Corrected Motion for Summary Judgment, ECF No. 171 in First Lawsuit, entered Sep. 24, 2015.

[46] First Lawsuit Summary Judgment Order at 10.

including a very brief discussion regarding the Signature Gathering Provision. State Defendants' counsel, Mr. Wolf, stated that "in order to be a qualified political party, the party has to allow the member to either seek the nomination through the convention process or seek the nomination through the signature process or both."[47] Mr. Wolf was referring to Utah Code 20A-9-101(12)(d) ("Either or Both Provision"), which states that in order to qualify as a QPP, the political party must allow the party candidate to seek the party's nomination "by the member choosing to seek the nomination by either or both of the following methods: [convention] or [signature gathering]."[48] Questions of interpretation of the Either or Both Provision were certified to the Utah Supreme Court and are discussed below.[49]

> The following exchange took place between the court and Mr. Wolf:
>
> THE COURT: So are there two levels of choice here, then? The qualified political party – let me go back to that – under 12(d), has to permit the member to do one or both of the petition method or nomination through the convention method. So if they only permit nomination by

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[47] Transcript of Summary Judgment Oral Argument held Oct. 27, 2015 ("Oct. 27 Tr.") at 34, Ex. A to 38 LG MJP, docket no. 38-1, filed Feb. 12, 2016.

[48] Utah Code 20A-9-101(12)(d).

[49] Memorandum Decision and Order of Certification ("First Certification Order"), docket no. 22, filed Feb. 4, 2016; Second Memorandum Decision and Order of Certification ("Second Certification Order"), docket no. 34, filed Feb. 11, 2016.

convention, they would be a QPP under 12(d). But then under 406 –

MR. WOLF: Yes.

THE COURT: -- the member of the party has the option to use either method regardless of what the party permitted.

MR. WOLF: And therein lays the dispute or the conflict between the party defining its membership.

THE COURT: That's the next lawsuit. I can't deal with it today.

MR. WOLF: It's not before you today, but I want to make sure our record is clear when we go through and create these facts. So I agree with you. You can be a QPP by providing either of those methods or both.

THE COURT: Okay.

MR. WOLF: But the candidate or the member or the individual has the right to seek the nomination through either or both of those methods. And that sets up a conflict between the party and its members who choose to run for office and potentially the Lieutenant Governor's office, the Lieutenant Governor is called on to make a decision concerning the objection.[50]

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[50] Oct. 27 Tr. at 35-36.

Discussion also took place during the October 27 hearing about whether the claims raised by the CPU and the URP in their respective complaints were moot if the Unaffiliated Voter Provision were held to be unconstitutional. The following exchange took place between the court and Messrs. Troupis and Mumford, counsel for the URP:

> THE COURT: I want to turn now to the Republican Party. If I rule and enter a declaratory judgment and possibly an injunction that 12(a) is unconstitutional and strike it, what other claims remain for adjudication in this case?
>
> MR. MUMFORD: May we just confer?
>
> THE COURT: Yeah. Everybody talk for a minute. Well, not everybody, just counsel. (Time lapse.)
>
> MR. TROUPIS: Your Honor, there would be no other issues for the Republican Party. No other claims. That would resolve the issues.[51]

The CPU's counsel also made similar statements that no other claims would remain, other than a "prevailing party" issue.[52] Based upon the statements made by the CPU's and the URP's counsel that no other claims beyond the Unaffiliated Voter Provision required resolution, and after analyzing in detail the Unaffiliated Voter Provision and the governing law regarding forced association, an order

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[51] *Id.* at 90.

[52] *Id.* at 91.

was entered on November 3, 2015, finding the Unaffiliated Voter Provision unconstitutional as applied to the CPU and the URP.[53] The order noted, however, that Utah Code 20A-9-406(1) replaced the function of the Unaffiliated Voter Provision even though "subsection 406 does not expressly allow a QPP to designate unaffiliated voters to vote in its primary."[54] The order stated that "such a deficiency is not unconstitutional."[55] On November 23, 2015, a Declaratory Judgment and Injunction was entered which closed the case.[56] The practical effect of the First Lawsuit was that unaffiliated voters were not able to participate in the URP or CPU primary elections, and were not able to sign petitions for URP or CPU candidates. There are 610,654 unaffiliated registered voters in Utah.[57] There are about 640,000 registered Republicans in Utah.[58]

URP and LG Communication Following the First Lawsuit

After the First Lawsuit concluded, the URP formally declared to the LG that it would restrict its candidate-selection procedures to the convention

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[53] The court granted summary judgment in favor of nonmovant URP under Rule 56(f). First Lawsuit Summary Judgment Order at 37-38.

[54] *Id.* at 36.

[55] *Id.*

[56] Declaratory Judgment and Injunction, ECF No. 215 in First Lawsuit, entered Nov. 23, 2015.

[57] First Lawsuit Summary Judgment Order at 8, ¶ 25.

[58] *Id.* at 8, ¶ 26.

method.[59] On November 19, 2015, the LG responded that he disagreed that the URP could make this restriction, asserting "it is the individual who has the right to choose their path to the ballot and the individual may seek a nomination by the use of both methods."[60] Republican State Senator Todd Weiler wrote a letter to the LG's Office asking about his options for gathering signatures in light of the URP's formal declaration. The LG's Office replied in a letter dated November 20, 2015 that Sen. Weiler had the option to gather signatures and if the URP revoked Sen. Weiler's party membership for gathering signatures, the URP *would no longer qualify as a QPP under Utah election law*.[61]

Subsequently, on January 19, 2016, the LG's Office issued a Voter and Candidate Clarification memorandum which modified the position taken in the letter to Sen. Weiler:

> Question #5: Is it possible that the Republican Party will lose its Qualified Political Party (QPP) status and that

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[59] Letter from URP Chairman James Evans to Lt. Gov. Spencer J. Cox at 2-3 (Dec. 3, 2015), attached as Ex. 1 to Notice of Filing of December 3, 2015 Letter from URP Chairman James Evans to Lt. Gov. Spencer J. Cox, docket no. 74-1, filed Apr. 5, 2016.

[60] Letter from Lt. Gov. Spencer J. Cox to URP Chairman James Evans at 1 (Nov. 19, 2015), attached as Ex. 2 to Complaint of Intervenor Utah Democratic Party, docket no. 20-2, filed Feb. 4, 2016.

[61] Letter from Utah Director of Elections Mark Thomas, Lt. Gov.'s Office, to Utah State Senator Todd Weiler (Nov. 20, 2015), attached as Ex. 2 to URP Complaint, docket no. 2-2, filed Jan. 15, 2016.

> candidates who choose only the caucus/convention path will be removed from the ballot?
>
> No. Because there is nothing in the law that anticipates what happens if a party fails to follow the requirements of a QPP, and because there is no provision to subsequently disqualify a party, this has been subject to different legal interpretations. On August 17, 2015, the Utah Republican Party certified their designation as a QPP and specifically stated their intention to follow all of the statutory QPP provisions and requirements. As such, my intention is to rely on this certification, and allow candidates access to the ballot through the caucus/convention process, unless and until the party officially revokes that certification. While I reject the possibility of removing candidates that rely on the law to get on the ballot by gathering signatures, I also reject the possibility of removing candidates that rely on the law to participate in the caucus/convention system.[62]

The LG's Office's position at the time it issued the Voter and Candidate Clarification Memorandum, then, is that a political party which has expressed its intent to restrict candidate- selection procedures to the convention method will still remain a QPP, and that the political party's candidates who use the

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[62] Voter and Candidate Clarification Memorandum at 3 (Jan. 19, 2016), docket no. 73, lodged Apr. 5, 2016.

convention method will have access to the ballot without concern that their party's QPP status will be revoked. The LG's Office has also taken the position that signature-gathering candidates from that political party will still have access to the ballot even though use of that method is contrary to stated URP intent.[63] To date, several URP members have declared their intention to gather signatures and have been qualified by the LG as having gathered enough verified signatures to appear on the URP's primary election ballot, including Sen. Weiler and the LG's running mate, Governor Gary R. Herbert.[64]

The Current Lawsuit

The URP filed the current lawsuit on January 15, 2016, asserting that SB54 was unconstitutional.[65] The current lawsuit appears to be very similar to the First Lawsuit in that it named the Governor and the LG as Defendants and seeks relief under the First and Fourteenth Amendments of the United States Constitution.[66] Specifically, in language very similar to paragraphs 110(a) through (h) of URP Complaint 1

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[63] However, it is unclear if the Lieutenant Governor's Office will place signature-gathering candidates from that political party on the ballot *as a candidate of the political party* they listed on their declaration of candidacy or if the signature-gathering candidates will appear on the ballot *with no party affiliation*.

[64] Utah Lieutenant Governor's Office, 2016 Candidate Signatures (Apr. 4, 2016, 04:18:41 PM), http://www.elections.utah.gov/election-resources/2016-candidate-signatures (last visited Apr. 14, 2016).

[65] URP Complaint ¶ 36.

[66] *Id.* ¶ 5.

in the First Lawsuit, paragraph 73 of the URP Complaint in this lawsuit asserts that:

> 73. The Party is entitled to a declaratory judgment establishing the unconstitutionality of the SB54 set forth above as applied to the manner in which
>
> . . .
>
> b. the State has taken away and misappropriated the Party's right to certify and endorse its nominees for elected office;
>
> c. the State has taken away and misappropriated the Party's right to communicate its endorsement on the general election ballot and to control the use of its name and emblem on the ballot;
>
> d. the State has taken away and misappropriated the Party's right to determine for itself the candidate selection process that will produce a nominee who best represents the Party's political platform;
>
> e. burdened the Party's associational rights by mandating changes to the Party's internal rules and procedures, at the threat of depriving the Party of its rights if it refuses to comply, that disadvantage the Party, and that the Party has rejected and that conflict with the rules the Party has determined for itself, as set forth in its Constitution and Bylaws, will produce a nominee who best represents the Party's political platform;

> f. burdened the Party's associational rights, and the rights of disassociation, by imposing upon the Party a nominee who may not necessarily be a Party member and without guaranteeing that nominee has been selected by a majority of Party members participating in the primary election;
>
> g. burdened the Party's associational rights and rights to free speech, by taking away the Party's right to have its nominees commit themselves to the Party Platform "as the standard by which my performance as a candidate and as an officeholder should be evaluated," and replacing it with a process that requires only that candidates gather signatures; . . . [67]

The UDP was permitted to intervene in the current lawsuit, and it asserts claims under the First and Fourteenth Amendment as well.[68]

After the current lawsuit was filed, a hearing was held to discuss the claims raised by the current

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[67] *Id.* ¶ 73. Summary judgment was previously granted in favor of the LG with respect to subparagraphs 73(a), (i), and (j). *See* 75 Order at 42. Also, the URP acknowledged in a hearing on February 4, 2016 that subparagraph 73(h) was not at issue because it was resolved in the First Lawsuit. Feb. 4 Tr. at 23. Further, subparagraph 73(k) is a "catch-all" which does not raise new subject matter that is not already alleged in the previous subparagraphs. Thus this memorandum decision and order addresses only subparagraphs 73(b) through (g).

[68] Complaint of Intervenor Utah Democratic Party ("UDP Complaint") ¶¶ 36, 49, 56, docket no. 20, filed Feb. 4, 2016.

lawsuit.[69] At the hearing, upcoming election deadlines were discussed and an expedited schedule was set for briefing of motions.[70] Certification of certain questions was also discussed.[71]

Certified Questions

Two questions from the current lawsuit were certified to the Utah Supreme Court. Both questions are based largely on the Either or Both Provision. The first question asks whether it is up to the *member* or the *party* to choose how the member of the party seeks nomination:

> In interpreting Utah Code § 20A-9-101(12)(d), § 20A-9-406(3) and § 20A-9406(4), does Utah law require that a Qualified Political Party (QPP) permit its members to seek its nomination by "either" or "both" of the methods set forth in § 20A-9-407 and § 20A-9-408, or may a QPP preclude a member from seeking the party's nomination by gathering signatures under § 20A-9-408?[72]

The second question asks whether the LG must revoke the QPP status of a political party that has elected to be a QPP but has not satisfied one or some of the requirements of a QPP, such as those listed in Utah Code § 20A-9-101(12):

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[69] Minute Entry, docket no. 21, entered Feb. 4, 2016.

[70] *Id.*; see also Important Dates in 2016 Utah Election Schedule, attached to Minute Entry, docket no. 21, filed Feb. 4, 2016.

[71] Minute Entry, docket no. 21, entered Feb. 4, 2016.

[72] First Certification Order at 1.

> If a registered political party ("RPP") that has elected to be designated as a Qualified Political Party ("QPP") fails to satisfy the requirements of a QPP, must the Lieutenant Governor treat that political party as an RPP under Utah law?[73]

Utah Supreme Court Ruling on Certified Questions

On April 8, 2016, the Utah Supreme Court issued a ruling on the first certified question.[74] The Court concluded that the Either or Both Provision requires a QPP to permit the member, not the party, to choose which path to take to the party's nomination.[75] The Court noted that "to meet the definitional requirements of a QPP, a political party must permit its members to seek its nomination by 'choosing to seek the nomination by either or both' the convention and the signature process."[76] The Court stated that it could not accept the URP's first assertion—that the language of the Either or Both Provision actually permits the party, not the member, to choose the path to the ballot—because that argument "simply ignores the structure of the statutory language . . . ."[77] The Court also held that allowing the member to choose

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[73] Second Certification Order at 3.

[74] *Utah Republican Party*, 2016 UT 17.

[75] *Id.* ¶ 4.

[76] *Id.*

[77] *Id.* ¶ 5.

the path to the ballot was in harmony with Utah Code §§ 20A-9-406(3) and -406(4).[78]

In rejecting the URP's argument that allowing the member to choose the path to the ballot interfered with the URP's internal procedures, the Court noted that "[t]he statute does not require the [URP] to seek certification as a [QPP], and it does not purport to mandate the adoption of any provisions in its constitution, bylaws, rules, or other internal procedures."[79] "However, if a party seeks certification as a QPP, it must comply with the statute's requirements."[80] The Court also stated that it "harbor[ed] some doubt as to whether the [URP] has raised any legitimate constitutional arguments that the State may not regulate the election process and favor particular measures to increase access to the ballot."[81]

Finally, the Court declined to answer the second question because it was "purely hypothetical and not ripe for review."[82] "[T]here are multiple options available to the [URP] once this court's interpretation of the QPP statute is published, and it is not clearly established in the record which of those the party will choose."[83] The Court stated that there was no process identified "by which the [URP] could or would revoke

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[78] *Id.*

[79] *Id.* ¶ 6.

[80] *Id.*

[81] *Id.* ¶ 7.

[82] *Id.* ¶ 8.

[83] *Id.* ¶ 9.

the membership of a non-compliant candidate."[84] In fact, the Court noted, "counsel for the [URP] in this case made the following statement to the federal district court on February [4], 2016: 'If the state law says that we have to allow both routes and if that is what the Supreme Court decides and if we have elected to be a QPP, then we would have to figure a way how to change our constitution and by-laws to conform to the state law.'"[85] The Court stated that the "differing and hypothetical indications" of the URP's "future behavior" discouraged the Court from "offer[ing] an advisory opinion on the future obligations of the [LG], where such advice would have to account for predicted future behavior of the party."[86]

URP's Constitution, Bylaws, and Rules

The URP is a Utah RPP.[87] The URP's candidate selection process includes caucus meetings, nominating and organizing conventions, and a primary election under certain circumstances.[88] The

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[84] *Id.*

[85] *Id.* ¶ 10.

[86] *Id.*

[87] 41 URP MPSJ at 5, ¶ 1 (citing Thomas Dep. at 100:13). Undisputed by the LG. LG Opposition at xii, ¶ 1. Undisputed by UDP. UDP Opposition at 5, ¶ 1(a).

[88] URP MPSJ at 7, ¶ 13 (citing Declaration of James Evans ("Evans Decl.") ¶ 20, attached as Ex. C to Plaintiff's Amended Motion for a Preliminary Injunction, ECF No. 13-3 in First Lawsuit, filed Jan 5, 2015; Utah Republican Party Constitution ("URP Constitution") Art XII.1.A-.B & .2.A-.J, Ex. 1 to Memorandum in Opposition to Defendant's Motion for Summary Judgment, ECF No. 177-1 in First Lawsuit, filed Oct. 9, 2015).

URP's Constitution provides that "Party membership is open to any resident of the State of Utah who registers to vote as a Republican and complies with the Utah Republican Party Constitution and Bylaws, and membership [requirements] may be further set forth in the Utah Republican Party Bylaws."[89] The URP's Bylaws require that candidates running for "any federal or statewide office" must "sign and submit a certification . . . and a disclosure statement."[90] The certification states that the candidate "will comply with the rules and processes set forth in the Utah Republican Party Constitution and these Bylaws. . . ."[91] The disclosure statement must state that

> either: (1) "I have read the Utah Republican Party Platform. I support that Platform and accept it as the standard by which my performance as a candidate and as an officeholder should be evaluated. I certify that I am not a candidate, officer, delegate nor position holder in any party other than the Republican party [sic]." Or (2) "I have read the Utah Republican Party Platform. Except for the provisions specifically noted below, I support that Platform and accept it as the

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Undisputed by the LG. LG Opposition at xvi, ¶ 13. Undisputed by UDP. UDP Opposition at 9, ¶ 13.

[89] URP Constitution Art. I.C.

[90] Utah Republican Party Bylaws ("URP Bylaws") at § 8.0(A), Ex. 2 to Memorandum in Opposition to Defendant's Motion for Summary Judgment, ECF No. 177-1 in First Lawsuit, filed Oct. 9, 2015.

[91] *Id.*

> standard by which my performance as a candidate and as an officeholder should be evaluated. I certify that I am not a candidate, officer, delegate nor position holder in any party other than the Republican party [sic]."[92]

The URP's nominating convention procedures require that delegates be notified of any candidate's failure to submit a Platform disclosure statement immediately prior to balloting for that candidate's office.[93] Except for candidates running unopposed, delegates to the nominating convention vote for URP nominees only after substantive speeches are made either by the individual candidates or on their behalf.[94]

The URP's Constitution and Bylaws dictate the voting procedure for the nominating conventions, mandating multiple ballots for each elected office until the field is winnowed to the top two candidates, or until a candidate receives 60% or more of the delegate's vote.[95] The URP's Constitution provides that "[a] candidate for an office that receives 60% or more of the votes cast at any point in the balloting process at the state nominating conventions shall proceed to the general election."[96] If no candidate receives 60% or more of the delegates' vote at convention as to a particular elected office, the URP

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[92] *Id.*

[93] *Id.* at § 8.0(B).

[94] URP Constitution Art. XII, § 2(F).

[95] *Id.* § 2(I); URP Bylaws §7.0(D)(3).

[96] URP Constitution Art. XII, § 2(I).

nominates the top two candidates to run in a primary election.[97]

URP's Additional Statements of Position

After the Utah Supreme Court issued its ruling on the certified questions, the URP was asked to file a memorandum:

> - Stating whether URP claims the statute, as interpreted by the Utah Supreme Court in *Utah Republican Party* v. *Cox*, 2016 UT 17 impermissibly burdens the party;
>
> - Stating whether the URP will "comply with the requirements of the QPP statute as confirmed in [the] opinion," *Utah Republican Party*, 2016 UT 17 [¶] 11, and if so, which relief sought by various parties would be moot;
>
> - Identifying any URP rule, regulation, procedure, bylaw or other provisions which expressly prohibits, limits, or penalizes a member from using the signature gathering process and attaching the identified materials;
>
> - Identifying any process by which the Utah Republican Party may revoke a person[']s membership and attaching the identified materials;
>
> - Stating whether the URP has commenced any such revocation proceeding as of the date of this docket text order and attaching all documentation of it; . . . .[98]

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[97] URP Bylaws §7.0(D)(3).

[98] Docket Text Order, docket no. 77, entered Apr. 11, 2016.

The URP filed its memorandum on April 13, 2016 ("April 13 Response").[99] The URP stated that the Utah Supreme Court's interpretation of the Either or Both Provision impermissibly burdened the URP's rights[100] and "impos[es] internal candidate selection procedures on the URP that conflict with those set forth in its Constitution and Bylaws."[101] The URP stated that it "will NOT" comply with the Utah Supreme Court's interpretation of the Either or Both Provision.[102] In earlier briefing the URP had taken this position, stating that it had "notified its members that it intends to select its candidates through the convention process rather than the signature gathering process, and that any person who seeks to avoid the convention selection process by declaring candidacy through the signature gathering process will be in violation of the [URP] rules and his or her membership revoked."[103]

In the URP's April 13 Response, the URP clarified that its position was that "[a] member's act of gathering signatures does not disqualify him or her from also seeking the party's nomination through the convention process. Only if that member fails to also

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[99] The Utah Republican Party's Memorandum in Response to Docket Order 77 ("April 13 Response"), docket no. 80, filed Apr. 13, 2016.

[100] *Id.* at 1.

[101] *Id.* at 2.

[102] *Id.* at 14. The URP later clarified that it meant it would comply with the requirements of the law "[i]f this Court rules that the QPP provisions of SB54 are constitutional . . . ." Utah Republican Party's Clarification and Correction to Response to Court's Order (Dkt. 77), docket no. 85, filed Apr. 15, 2016.

[103] URP MPSJ at 16-17.

satisfy the party requirement to obtain at least 40% of the convention votes for that office would a member be barred from seeking the nomination."[104] The URP stated that the LG's "act of certifying candidates who qualify for the ballot only by gathering signatures violates the [URP]'s right to freedom of association, whether or not the [URP] terminates the member who is certified."[105]

Because the URP had stated it would revoke the membership of any URP candidate using the signature gathering process,[106] the URP was asked about the revocation process. The URP stated that it had "not commenced any revocation proceeding against a member as of April 11, 2016,"[107] but that if it needed to do so, the proceeding would follow the procedures outlined in Roberts Rules of Order.[108] The URP quotes several pages verbatim from the Roberts Rules of Order.[109]

DISCUSSION

The URP seeks summary judgment on two claims: (1) the constitutionality of SB54 and (2) invidious discrimination.[110] Each of these claims will be discussed below. Prior to discussing those claims, however, there are three non-merits arguments that

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[104] April 13 Response at 49.

[105] *Id.*

[106] 41 URP MPSJ at 16-17.

[107] April 13 Response at 49.

[108] *Id.* at 16.

[109] *Id.* at 17-20.

[110] 41 URP MPSJ at 3-5.

must be addressed. Those arguments are preclusion, ripeness, and standing.

Preclusion Issues Presented

The 75 Order denied the LG's and the UDP's preclusion defenses, but did not rule whether claim preclusion bars the URP claims regarding the Either or Both Provision.[111] The 75 Order also did not rule on the LG's argument that claim preclusion bars "all [URP] claims."[112] The LG does not articulate what it means by "all claims," but because the 75 Order denied all arguments that were not expressly addressed, the only claim preclusion argument that will be addressed in this Memorandum Decision and Order is the argument that claim preclusion bars URP's claims *with respect to the Either or Both Provision*. That argument is construed to mean that claim preclusion bars the URP from pursuing subparagraphs 73(b) through (g).

The UDP also argues that issue preclusion bars URP from pursuing subparagraphs 73(b) through (g).[113] Claim preclusion will be discussed first, followed by discussion of issue preclusion.

Claim Preclusion Does Not Bar URP Claims in Subparagraphs 73(b) through (g)

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[111] 75 Order at 40-41.

[112] *Id.* ("The LG's argument that claim preclusion applies to bar *all* of URP's claims is not addressed in this Memorandum Decision and Order." (emphasis in original)).

[113] UDP Opposition at 20.

Claim preclusion "ensures finality of decisions."[114] "A final judgment on the merits bars further claims by parties or their privies based on the same cause of action."[115] Claim preclusion "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."[116] Claim preclusion applies when the following elements are present: (1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits.[117]

With respect to the first element, all parties agree that the First Lawsuit resulted in a final judgment on the merits.[118]

The second element also is satisfied since there is "identity of parties" in the two lawsuits. The URP was

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[114] *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979).

[115] *Id.*

[116] *Id.*

[117] *Yapp* v. *Excel Corp.*, 186 F.3d 1222, 1226 n.4 (10th Cir. 1999) ("Generally, Supreme Court precedent, Tenth Circuit precedent, and the majority of circuit courts note only three requirements in the initial determination of whether claim preclusion may apply."); *Pelt* v. *Utah*, 539 F.3d 1271, 1281 (10th Cir. 2008).

[118] URP Reply at 2; Combined Opposition to the Motions of Lieutenant Governor Cox and the Utah Democratic Party for Judgment on the Pleadings ("47 URP Opposition") at 13, docket no. 47, filed Feb. 19, 2016 ("[T]he First Lawsuit already resulted in a final judgment"); UDP Opposition at 24 ("[T]here was a final adjudication on the merits"); LG Opposition at 1 (incorporating previous briefing); 38 LG MJP at 2 ("The Court's orders of dismissal in the prior case constitute a final judgment on the merits.").

a party to the First Lawsuit and initially sued the Governor and LG in their official capacities. While it is true that the intervenors in the two cases are different,[119] and that the Governor was dismissed from the current case,[120] the named parties at the commencement of each suit are identical—the URP, as plaintiff, sued the Governor and the LG. Often the "identity of parties" element is asserted against a plaintiff who *did not* take part in a prior lawsuit, and a defendant will argue that the plaintiff was in "privity" with the plaintiff who was a party in the prior lawsuit.[121] Thus, as to the UDP, this element is not satisfied because the UDP was not a plaintiff in the First Lawsuit and likely cannot be said to be in "privity" with the URP. However, claim preclusion is not raised as to the UDP. It is raised as to the URP. Thus, as to the URP, the "identity of parties" element is satisfied.

The third element is not satisfied, however, because the causes of action are not identical in both suits. The LG and the UDP argue that the causes of action are identical because the wording of subparagraphs 73(b) through (g) is identical to some of the language in the complaint in the First Lawsuit.[122] The LG and the UDP argue that the URP now makes the same assertions it made in the First

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[119] CPU intervened in the First Lawsuit; UDP intervened in the current lawsuit.

[120] Order Dismissing Defendant Gary R. Herbert Governor of Utah, docket no. 16, entered Feb. 1, 2016. 121 *See Pelt*, 539 F.3d at 1281.

[121] See *Pelt*, 539 F.3d at 1281.

[122] UDP Opposition at 24; 38 LG MJP at 5.

Lawsuit, such as the contention that "the State" has taken away the URP's right to communicate its endorsement on the general election ballot and has taken away the URP's right to determine for itself the candidate selection process that will produce a nominee who represents the URP's platform.[123] The LG and the UDP are correct that the wording in both complaints is the same, but this case arises in a different factual context than the First Lawsuit. The words are directed at and allegedly descriptive of different alleged defects in SB54.

In the First Lawsuit, the URP had not made a statement that its candidates would be prohibited from following the QPP signature gathering path. The URP now takes that position.[124] In the First Lawsuit, the LG had not stated whether the URP could bar its candidates from pursuing signature gathering. Now the LG has issued at least two statements on that question, stating that the URP must allow the member to have access to the primary ballot by gathering signatures.[125] And in the First Lawsuit, the Utah Supreme Court had not interpreted the Either or Both Provision. Now a ruling from the Utah

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[123] 38 LG MJP at 4; UDP Opposition at 24.

[124] Letter from URP Chairman James Evans to Lt. Gov. Spencer J. Cox at 2-3 (Dec. 3, 2015), attached as Ex. 1 to Notice of Filing of December 3, 2015 Letter from URP Chairman James Evans to Lt. Gov. Spencer J. Cox, docket no. 74-1, filed Apr. 5, 2016.

[125] Letter from Utah Director of Elections Mark Thomas, Lt. Gov.'s Office, to Utah State Senator Todd Weiler (Nov. 20, 2015), attached as Ex. 2 to URP Complaint; Voter and Candidate Clarification Memorandum at 3 (Jan. 19, 2016), docket no. 73, lodged Apr. 5, 2016.

Supreme Court states that it is the member's right to choose their path to the ballot.[126]

Thus, the central issue in this case is different from the issues presented in the First Lawsuit. Here, the central question is whether it is a "severe" burden on the URP's rights for the LG to allow a URP candidate to gather signatures to obtain primary ballot access when the URP has expressed a desire that its candidates obtain primary ballot access only by participating in the URP's convention.

To be sure, claim preclusion does not apply with respect to the URP claims about the Either or Both Provision. The Either or Both Provision provides that a QPP is a registered political party that:

> (d) permits a member of the registered political party to seek the registered political party's nomination for any elective office by the member choosing to seek the nomination by either or both of the following methods:
>
> > (i) seeking the nomination through the registered political party's convention process, in accordance with the provisions of Section 20A-9407; or
> >
> > (ii) seeking the nomination by collecting signatures, in accordance with the provisions of Section 20A-9-408; . . . .[127]

The parties disagreed as to the interpretation of this section. The UDP and the LG agreed that the proper interpretation was that a QPP must allow *the*

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[126] *Utah Republican Party*, 2016 UT 17, ¶ 4.

[127] Utah Code § 20A-9-101(12)(d).

member to choose the method of nomination. But the URP argued that the proper interpretation was that the *party* may choose the method of nomination. The URP took the position that as long as the party provided *either* of the methods identified in the statute—convention (-407) ***or*** signature gathering (-408)—the party has satisfied the requirements of the Either or Both Provision. The Utah Supreme Court has now held that the statute gives the member the right to seek a place on the primary election ballot by signature gathering, by the convention, or both.[128] The Supreme Court's definitive interpretation of the Either or Both Provision places this case in a different context than the First Lawsuit.

Also, the Either or Both Provision was not squarely at issue in the First Lawsuit. While it is true that some discussion took place about this provision in the October 27 hearing, the proper interpretation of the Either or Both Provision became ripe only after the conclusion of the First Lawsuit when the URP formally declared to the LG that it would restrict its candidate-selection procedures to the convention method, thereby prohibiting any URP candidate from gathering signatures.[129] That position was different than the LG's interpretation, and the LG stated that he disagreed that URP could make this restriction.[130]

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[128] Utah Republican Party, 2016 UT 17, ¶ 4.

[129] Letter from URP Chairman James Evans to Lt. Gov. Spencer J. Cox at 2-3 (Dec. 3, 2015), attached as Ex. 1 to Notice of Filing of December 3, 2015 Letter from URP Chairman James Evans to Lt. Gov. Spencer J. Cox, docket no. 74-1, filed Apr. 5, 2016.

[130] Letter from Lt. Gov. Spencer J. Cox to URP Chairman James Evans at 1 (Nov. 19, 2015), attached as Ex. 2 to Complaint of

Later, the LG's Office stated that if the URP revoked Sen. Weiler's party membership for gathering signatures, the URP *would no longer qualify as a QPP under Utah election law*.[131]

Subsequently, on January 19, 2016, the LG's Office issued a Voter and Candidate Clarification memorandum which modified the position taken in the letter to Sen. Weiler.[132] The LG's Office no longer took the position that it would revoke the URP's QPP status if it refused to allow its candidates to gather signatures. Rather, the LG's Office took the position that the URP could still remain a QPP if it restricted its candidate selection process to only the convention route. The LG's Office has also taken the position that signature-gathering candidates from the URP will still have access to the ballot.[133]

After the First Lawsuit ended, several URP members have declared their intention to gather signatures and have been qualified by the LG as having gathered enough verified signatures to appear on the URP's primary election ballot, including Sen.

Intervenor Utah Democratic Party, docket no. 20-2, filed Feb. 4, 2016.

[131] Letter from Utah Director of Elections Mark Thomas, Lieutenant Governor's Office, to Utah State Senator Todd Weiler (Nov. 20, 2015), attached as Ex. 2 to URP Complaint, docket no. 2-2, filed Jan. 15, 2016.

[132] Voter and Candidate Clarification Memorandum (Jan. 19, 2016), docket no. 73, lodged Apr. 5, 2016.

[133] However, it is unclear if the LG's Office will place signature-gathering candidates on the ballot *as a candidate of the political party* they listed on their declaration of candidacy or if the signature-gathering candidates will appear on the ballot *with no party affiliation.*

Weiler and the LG's running mate, Governor Gary R. Herbert.[134] These events were not addressed in any of the rulings of the First Lawsuit. Thus, arguments regarding the Either or Both Provision are not subject to claim preclusion because they were not "previously available to the parties"[135] and only became ripe after the conclusion of the First Lawsuit.

Even though the URP alleges the same rights are threatened, the factual circumstances and the issues raised in this lawsuit are different. Therefore, the "identity of the cause of action" element is not satisfied and claim preclusion does not bar URP from pursuing its claims under subparagraphs 73(b) through (g).

Issue Preclusion Does Not Bar URP Claims in Subparagraphs 73(b) through (g)

"In contrast to claim preclusion, issue preclusion [also known as collateral estoppel] bars a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim."[136] Issue preclusion applies when the following elements are present: "(1) the issue

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[134] Utah Lieutenant Governor's Office, 2016 Candidate Signatures (Apr. 4, 2016, 04:18:41 PM), http://www.elections.utah.gov/election-resources/2016-candidate-signatures (last visited Apr. 14, 2016).

[135] *Brown*, 442 U.S. at 131 ("Res judicata [claim preclusion] prevents litigation of all grounds for, or defenses to, recovery *that were previously available to the parties*, regardless of whether they were asserted or determined in the prior proceeding." (emphasis added)).

[136] *Park Lake Resources LLC* v. *U.S. Dep't of Ag.*, 378 F.3d 1132, 1136 (10th Cir. 2004).

previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action."[137]

The second and third elements are satisfied. The parties agree that the First Lawsuit was finally adjudicated on the merits[138] and URP—the party against whom issue preclusion is invoked—was a party to the First Lawsuit. However, as discussed above, the issues raised in this lawsuit are not identical to the ones presented in the First Lawsuit and therefore, the URP did not have a full and fair opportunity to litigate them. Consequently, the first and fourth elements of issue preclusion are not satisfied and URP is not barred under the doctrine of issue preclusion from pursuing its claims under subparagraphs 73(b) through (g).

Because neither claim preclusion nor issue preclusion apply to bar URP from pursuing its claims under subparagraphs 73(b) through (g), the preclusion arguments fail. This conclusion fully

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[137] *Id.*

[138] URP Reply at 2 (incorporating previous briefing); 47 URP Opposition at 13 ("[T]he First Lawsuit already resulted in a final judgment"); UDP Opposition at 24 ("[T]here was a final adjudication on the merits"); LG Opposition at 1 (incorporating previous briefing); 38 LG MJP at 2 ("The Court's orders of dismissal in the prior case constitute a final judgment on the merits.").

resolves the 37 UDP MJP and the 38 LG MJP. Accordingly, those motions are DENIED

The Issues are Ripe

The LG argues the URP's claims are not ripe "because URP's rules and internal procedures are not in conflict with state law."[139] In other words, the LG argues that the URP's Constitution and Bylaws do not restrict candidates from gathering signatures and do not require revocation of membership if a URP candidate decides to gather signatures.[140] Instead, the LG argues, the URP Constitution provides that membership is open to all who register to vote as a Republican and commit to comply with the URP Constitution and Bylaws.[141] The LG further argues that the URP Bylaws require a URP candidate to agree to comply with the procedures governing the URP convention and must submit a disclosure statement stating the candidate either supports or partially supports the URP Platform.[142] But "[c]onspicuously absent from URP's Bylaws is any restriction on candidates collecting signatures to access the primary ballot."[143] Therefore, the LG argues, the URP's claims "depend on contingent future events" and are not ripe.[144]

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[139] LG Opposition at 4.

[140] *Id.* at 5.

[141] *Id.* at 4-5.

[142] *Id.*

[143] *Id.* at 5.

[144] *Id.* at 5-6 (citing Utah Code §§ 20A-9-101(12)(d) and -202(5)).

The URP disagrees, arguing that the claims are ripe for adjudication because signature gathering has already begun and the LG "has stated that he will overrule any objection by the [URP] to nominees who bypass the convention method in favor of signature gathering."[145] This, the URP argues, constitutes "injury in fact" because it is a "threat of enforcement" of an unconstitutional law.[146] The URP argues that if it is required to wait until future events occur, "the 2016 primary election will have already concluded with the risk that the entire election could be invalidated."[147]

"In order for a claim to be justiciable under Article III, it must present a live controversy, ripe for determination, advanced in a 'clean-cut and concrete form.'"[148] The ripeness inquiry, however, "focuses not on whether the plaintiff was in fact harmed, but rather whether the harm asserted has matured sufficiently to warrant judicial intervention."[149] "First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss."[150] "The principle that one does not have to await the consummation of threatened injury to obtain

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[145] URP Reply at 5.

[146] *Id.*

[147] *Id.* at 4.

[148] *Kansas Judicial Review* v. *Stout*, 519 F.3d 1107, 1116 (10th Cir. 2008).

[149] *Id.*

[150] *New Mexicans for Bill Richardson* v. *Gonzales*, 64 F.3d 1495, 1500 (10th Cir. 1995).

preventative relief is particularly true in the election context . . . ."[151]

The election process is currently well underway. Political parties have already designated whether they will be a QP[152] and QPPs have indicated which political parties' members may vote in their primary election.[153] QPP candidates have filed their "notice of intent" to gather signatures[154] and have filed declarations of candidacy to participate in the QPP's convention[155] and gather signatures.[156] The time for filing objections to QPP candidates' declarations of candidacy has passed.[157] QPP candidates have gathered signatures[158] and submitted those signatures for verification.[159] The URP convention is scheduled to take place on April 23, 2016, and the LG must indicate to the URP which signature-gathering

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[151] *Id.* at 1501 (citations and internal quotation marks omitted, alterations incorporated).

[152] See Utah Code § 20A-9-101(12)(e) (requiring notice by Sep. 30, 2015).

[153] See *id.* § 20A-9-406(1) (requiring notice by Mar. 1, 2016).

[154] See *id.* § 20A-9-408(3)(a) (requiring notice between Jan. 1, 2016 and Mar. 17, 2016).

[155] See *id.* § 20A-9-407(3)(a) (requiring notice between Mar. 11, 2016 and Mar. 17, 2016).

[156] See *id.* § 20A-9-407(3)(b) (requiring notice between Mar. 11, 2016 and Mar. 17, 2016).

[157] See *id.* § 20A-9-202(5)(a) (requiring objection by Mar. 24, 2016).

[158] See *id.* § 20A-9-408(8)(b) (allowing signature-gathering between Jan. 1, 2016 and Apr. 9, 2016).

[159] See *id.* § 20A-9-4080(9)(a)(ii) (requiring submission by Apr. 11, 2016).

candidates have qualified for the URP's primary election ballot on April 22, 2016, the day before the URP convention.[160] On April 29, 2016, ballot forms must be at the printer so that by May 13, 2016, ballots may be mailed to overseas and military voters.[161] Primary elections will be held on June 28, 2016, just two months away.[162] It would be imprudent to defer the claims raised by the URP until they ripen into the most complete and full injury. At that point, conventions will be past, ballots will be printed, and the election process will be at an advanced stage. Such a delay could risk invalidation of election results.

While the LG is correct that there is nothing in the URP Constitution or Bylaws that expressly prohibits a candidate from gathering signatures, the URP has stated it will revoke the membership of signature-gathering candidates.[163] The URP reaffirmed its position after the Utah Supreme Court definitively ruled on the interpretation of the Either or Both Provision, holding that it is the member's right to gather signatures. The URP has stated it will challenge the placement of signature-gathering

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[160] See *id.* § 20A-9-408(9)(d) (requiring notice by Apr. 22, 2016).

[161] Important Dates in 2016 Utah Election Schedule, docket no. 21, filed Feb. 4, 2016.

[162] *Id.*

[163] 41 URP MPSJ at 16-17 ("The [URP] has notified its members that it intends to select its candidates through the convention process rather than the signature gathering process, and that any person who seeks to avoid the convention selection process by declaring candidacy through the signature gathering process will be in violation of the [URP] rules and his or her membership revoked.").

candidates on the URP primary ballot.[164] The LG has stated that it will place such candidates on the ballot despite the URP's objection.[165] These opposing positions present the risk that a candidate may appear on the URP's primary election ballot as a member of the URP, in spite of a URP claim that the candidate is not a member,[166] which would raise the issue of the URP's associational rights. The pressing election schedule[167] and the need for an orderly election process require current consideration of the issues.

Moreover, even if there were no risk that a non-member candidate would appear on the URP's primary election ballot, the URP has indicated that it is injured by the existence of the signature gathering option because it takes away the URP's right to endorse nominees for office, to control the use of its name and to determine its own candidate selection process, and also burdens its associational rights.[168]

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[164] April 13 Response at 14.

[165] Voter and Candidate Clarification Memo at 3 (Jan. 19, 2016), docket no. 73, lodged Apr. 5, 2016 (rejecting "the possibility of removing candidates that rely on the law to get on the ballot by gathering signatures").

[166] The URP has not indicated that it objected to any candidate's declaration of candidacy on the basis that the candidate is not a member of the URP. See Utah Code § 20A-9-202(5) (allowing objection to be made to a candidate's declaration of candidacy "within five days after the last day for filing").

[167] Important Dates in 2016 Utah Election Schedule, docket no. 21, filed Feb. 4, 2016.

[168] URP Complaint ¶ 73; April 13 Response at 49 (arguing that the LG's "act of certifying candidates who qualify for the ballot only by gathering signatures violates the [URP]'s right to

The substance of these arguments is addressed below. No statement about their sufficiency is made here. For purposes of ripeness, these alleged injuries do not have to take place in order for the URP to have raised a justiciable claim, especially in the context of the First Amendment.[169] The URP's claims are ripe for review.

Standing Issues and Doctrine

Two standing arguments are raised in the briefing on the 41 URP MPSJ. One is raised by the LG and the other is raised by the URP. The LG argues that the URP does not have standing to bring claims without a URP member joined in the lawsuit.[170] The URP argues the UDP does not have standing to assert the LG's legal rights and interests and participate in the briefing on the 41 URP MPSJ.[171] Each of these arguments is incorrect.

The U.S. Supreme Court has explained that standing must be established by three elements:

> (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[;]" (2) a causal relationship between the injury and the challenged

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freedom of association, whether or not the [URP] terminates the member who is certified").

[169] See *Kansas Judicial Review*, 519 F.3d at 1116; *New Mexicans for Bill Richardson*, 64 F.3d at 1500-01.

[170] LG Opposition at 7.

[171] URP Reply at 1.

> conduct, by which we mean that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court[;]" and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative[.]" These elements are the "irreducible minimum" required by the Constitution.[172]

The URP has Standing in the Case

The three elements of standing are satisfied with respect to the URP. First, the URP has pleaded concrete and particularized injury that is actual or imminent by asserting that its First Amendment rights would be impacted by the LG's decision to allow URP candidates access to the ballot against the URP's wishes. Since the LG has indicated it will authorize signature gathering candidates to appear on the primary election ballot despite the URP's objections, there is an actual potential injury. Second, the URP has demonstrated a sufficient causal relationship between the alleged injury and the LG's actions. The URP alleges that the LG's placement of signature-gathering candidates on the ballot will injure the URP if the application of the law is unconstitutional as to the URP. Third, the injury will be redressed if the LG is prohibited from enforcing the law as to the URP.

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[172] *Northeastern Fl. Chapter of Assoc. Gen. Contractors of Am.* v. *City of Jacksonville, Fl.*, 508 U.S. 656, 663-64 (1993) (citations omitted).

Thus, the standing elements are satisfied with respect to the URP.

The LG argues that the URP lacks standing because it has not joined a member of the URP in its claims. As the LG recognizes,[173] a political party has constitutional interests that are distinct from the constitutional interests held by a candidate seeking the nomination of that political party. The URP has established standing as an entity because it has rights that are separate from the interests of an individual member-candidate.

The LG raises valid distinctions between the rights of candidates and parties,[174] but these points do not establish a lack of standing for the URP. Instead, they show that a URP candidate may not have a justiciable claim against the URP until the URP actually revokes the candidate's membership as the URP has indicated it may do. As discussed more fully below, that claim is not presented here. This Memorandum Decision and Order deals only with the claims of the URP as an entity, which the URP has standing to raise.

The UDP has Standing on the Motion

The URP's argument that the UDP lacks standing "to oppose the [41 URP MPSJ] Motion"[175] is rejected for three reasons. First, the URP makes no effort to

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[173] LG Opposition at 8 ("Regulations of party membership and regulations of primary candidates raise different constitutional issues").

[174] *Id.* (citing *Nathaniel Persily, Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 Geo. L.J. 2181, 2212 (2001)).

[175] URP Reply at 1.

explain how the three elements of standing—injury, causation, and redressability—are not satisfied. Instead, the URP argues that the LG is fully capable of defending the law and does not need the UDP's help to do so.[176] The URP makes this argument because it believes the UDP is merely advancing the rights of "the State," and in that circumstance, a different standing analysis applies.[177] But this is the second reason URP's standing argument fails: the UDP is not seeking to advance the rights of a third party.[178] Rather, it is seeking to advance its own legal rights and to urge the LG to enforce the election laws equally and consistently as to all political parties so that one political party does not have an advantage over another.[179]As a political party in the State of Utah and as a party in this lawsuit, the UDP may take a position that is contrary to the URP and assert arguments as to the URP's interpretation of the law—even if UDP is an intervenor-plaintiff with no asserted

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[176] *Id.* at 2 (citing 47 URP Opposition at 3).

[177] See URP Opposition at 3 (citing *Brokaw* v. *Salt Lake City*, Case No. 2:06-cv-00729-TS, 2007 WL 2221065, at *2 (D. Utah Aug. 1, 2007) (stating that "there may be circumstances where it is necessary to grant a third party standing to assert the rights of others," but two additional showings must be made: "(1) that the party asserting the right has a close relationship with the person who possesses the right; and (2) that there is a hindrance to the possessor's ability to protect his own interests.")).

[178] 47 URP Opposition at 3 (citing *Brokaw*, 2007 WL 2221065, at *2 (holding that "a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.")).

[179] First Amended Complaint of Intervenor Utah Democratic Party ("UDP Amended Complaint") ¶ 32, docket no. 83, filed Apr. 14, 2016.

claims against the URP.[180] Third, the URP's argument is rejected because it is an effort to reargue why UDP should not have been allowed to intervene.[181] URP's effort to revisit intervention is improper.[182] The other arguments URP raises with respect to standing, such as the argument that UDP should be realigned as a defendant instead of a plaintiff,[183] are immaterial to the standing issue and are rejected. The UDP has standing to oppose the URP's positions.

Having reviewed the non-merits arguments and finding none of them bar consideration of the merits of the 41 URP MPSJ, the URP's merits arguments will now be discussed. They are:

(1) the constitutionality of SB54; and (2) invidious discrimination. Each will be discussed in turn.

The Either or Both Provision is Constitutional

The URP argues that it has a "First Amendment Right to limit its membership as it wishes and to choose a candidate selection process that will in its view produce the nominee who best represents its political platform."[184]The URP Complaint alleges "the

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[180] See *Seminole Nation of Okla.* v. *Norton*, 223 F.Supp.2d 122, 130 n.11 (allowing plaintiff-intervenor to oppose plaintiff's motion for summary judgment).

[181] URP Reply at 2 ("This is improper and further demonstrates why the UDP should not be a party to this lawsuit.").

[182] Order Granting Motion to Intervene, docket no. 18, entered Feb. 3, 2016.

[183] 47 URP Opposition at 4.

[184] 41 URP MPSJ at 12 (quoting *New York State Bd. of Elections* v. *Lopez Torres*, 552 U.S. 196, 202 (2008)).

State is seeking to impose on the Party a system of candidate-selection rules and internal processes that is different from the rules and processes the Party has chosen for itself" and thereby "the State is violating the rights of the Party . . . ."[185] Subparagraphs 73(b) – (g) of the URP Complaint specify these asserted rights.

> b. . . . the . . . right to certify and endorse its nominees for elected office;
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> c. . . . the . . . right to communicate its endorsement on the general election ballot and to control the use of its name and emblem on the ballot;
>
> d. . . . the . . . right to determine for itself the candidate selection process that will produce a nominee who best represents the Party's political platform;
>
> e. . . . associational rights [to control] the [URP]'s internal rules and procedures . . . ;
>
> f. . . . associational rights, and the rights of disassociation [to ensure that a nominee is a member of the URP and is selected by a majority of URP members] . . . ;
>
> g. . . . associational rights and rights to free speech [to ensure nominees commit

[185] URP Complaint ¶ 54.

> themselves to the URP Platform instead of being replaced] with a process that requires only that candidates gather signatures;[186]

Before discussing each of the URP's asserted rights, however, it is important to review the principles and standards used when determining the constitutionality of an election law. As explained in the summary judgment ruling in the First Lawsuit, many cases explain the constitutionality of election laws as the courts analyze whether a law imposes a "severe" burden.[187] That line of cases will not be repeated here. The principle that emerges from those cases is that while a state may regulate elections and political parties, it may not go too far in such regulation. It is "too plain for argument that a State may prescribe party use of primaries or conventions to select nominees who appear on the general-election ballot."[188] But a state may not force a political party to associate with unwanted members or voters.[189] Thus, a state has power to structure and monitor the election process,[190] but the state's power "is not without limits."[191] The challenge is to determine the

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[186] *Id.* ¶ 73(b) through (g).

[187] See First Lawsuit Summary Judgment Order at 14-22 (explaining line of cases involving election law in First Amendment context).

[188] *Lopez-Torres*, 552 U.S. at 202-03.

[189] *Clingman* v. *Beaver*, 544 U.S. 581, 589 (2005); *Idaho Republican Party* v. *Ysursa*, 765 F.Supp.2d 1266 (D. Idaho 2011); *Arizona Libertarian Party et al.* v. *Brewer*, No. 02-144-TUC-RCC (D. Ariz. 2007).

[190] *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 572 (2000).

[191] *Lopez-Torres*, 552 U.S. at 203.

state's limits and when a state has crossed the line between appropriate and inappropriate regulation. The test was thoroughly explained in *Greenville County Republican Party Executive Committee* v. *South Carolina*:

> It is unavoidable that election laws will impose some burden upon individual voters [and political organizations]. *Burdick*, 504 U.S. at 433, 112 S.Ct. 2059. However, "the mere fact that a State's system 'creates barriers . . . does not of itself compel close scrutiny.'" *Id.* (internal citations omitted). Instead, "[a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* at 434, 112 S.Ct. 2059; see also *Eu* v. *San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989). If the court finds that the election regulations impose a severe burden on associational rights, they are subject to strict scrutiny and the court will uphold them only if they are "narrowly tailored to serve a compelling state interest." *Wash. State Grange*, 552 U.S. at 451–52, 128 S.Ct. 1184 (internal citations omitted). "If a statute imposes only modest burdens, however, then 'the State's important regulatory interests are generally sufficient to justify reasonable,

> nondiscriminatory restrictions on election procedures." *Id.* at 452, 128 S.Ct. 1184 (internal citations omitted).[192]

Under this framework, the Either or Both Provision is constitutional. It is not a violation of the URP's constitutional rights to allow a URP candidate to access the URP primary election ballot by the candidate choosing to gather signatures, participate in the party's convention, or engage in both processes. This is true even if the URP would prefer to limit the candidate's options for ballot access to only a single process.

The Signature Gathering Provision and the Either or Both Provision Fulfill Important State Regulatory Interests

At the outset, it is clear that the Signature Gathering Provision and the Either or Both Provision fulfill important state regulatory interests. Those interests include managing elections in a controlled manner, increasing voter participation, and increasing access to the ballot.[193] By providing more ways for a candidate to qualify for the primary election ballot, ballot access is increased. By requiring that all candidates participate in a primary after participating in a convention or gathering signatures, voter participation and control is increased. Primaries

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[192] *Greenville*, 824 F. Supp. 2d at 662.

[193] Utah Code § 20A-9-401 ("This part shall be construed liberally so as to ensure full opportunity for persons to become candidates and for voters to express their choice."); Utah Code § 20A-2-300.6 (stating that the LG is "Utah's chief elections officer" and shall "ensure compliance with state and federal election laws").

allow all qualified voters to participate rather than limiting voting power to selected delegates.

Requiring a primary allows the LG to "ensure compliance with state and federal election laws"[194] more effectively than if nominee selection is left to a party-managed convention process. Unless one of the URP's asserted rights is severely burdened, the important state regulatory interest will support the state requirement of access to the primary election ballot by signature gathering, in spite of party wishes to the contrary.

Issue Framing is Not Determinative

The URP and the LG frame the issues differently when speaking of the constitutionality of SB54's requirement that party members have access to the primary election ballot through signature gathering. The variant framing leads them to cite different legal authority and to draw different conclusions. The LG claims that the signature gathering path to the primary election ballot is a legitimate exercise of state regulation of elections,[195] while the URP claims its ability to regulate membership allows it to bar members who use this state-authorized path.[196] The LG cites cases upholding state regulation of the election process, while the URP cites cases allowing political parties to define their membership, control internal processes, and be free from forced association.

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[194] *Id.* § 20A-2-300.6.

[195] LG Opposition at 9-10.

[196] 41 URP MPSJ at 12-13.

But the URP attempts to use its power to regulate membership, to control internal procedure, and its freedom of association to contradict state law. None of the parties cite legal authority dealing with a party rule attempting to override state election legislation, although the URP cites several cases that are distinguishable from the issues raised in this case, as noted by the LG and the UDP.[197]

In this balance of power between political parties and state regulation of elections, the political party may not disguise a contradiction of a valid state regulation as a legitimate use of its power to regulate membership, control internal procedure, and enjoy freedom of association. While a political party may do these things, it may not do so in conflict with valid state regulation of election processes.

SB54 Provides Significant Control to the URP in the Primary Election Process

As the burden imposed by the state's regulation is analyzed, the following factors reduce any burden placed on the URP:

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[197] See Utah Democratic Party's Response to [80] Utah Republican Party's Memorandum Response to Docket Order 77 at 4-7, docket no. 82, filed Apr. 14, 2016 (distinguishing *Democratic Party* v. *Wisconsin ex rel. La Follette*, *Cousins* v. *Wigoda*, *Ray* v. *Blair*, *Langone* v. *Secretary of the Commonwealth*, *Hopfmann* v. *Connolly*, *United States* v. *Classic*, and *Smith* v. *Allwright*); Defendant's Response to Utah Republican Party's Memorandum in Response to Docket Order 77 at 3-8, docket no. 84, filed Apr. 14, 2016 (distinguishing *Ray* v. *Blair*, *Cousins* v. *Wigoda*, and *Duke* v. *Cleland*).

• The URP maintains complete control over who votes in its primary election and has the ability to close its primary to all other parties.[198]

• The URP has the ability to restrict signature gathering to members of the URP only.[199]

• An individual may not file a declaration of candidacy as a URP candidate unless the individual is a member of the URP.[200]

• The URP may object to a candidate's declaration of candidacy.[201]

Any burden placed on the URP is significantly reduced because the URP maintains a great deal of control over the primary election process.

None of the URP's Rights Are Severely Burdened

Each of the URP's asserted constitutional rights, and the burden placed upon them, will now be addressed specifically below. This section determines that none of the URP's rights are severely burdened.

The URP's Asserted Right to Certify and Endorse Nominees is Not Severely Burdened

The URP argues that SB54 takes away its right to certify and endorse nominees. The URP is incorrect.

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[198] See Utah Code § 20A-9-406(1).

[199] See *Id.* § 20A-9-408(8)(b)(i) through (v) (allowing signatures from those who "are permitted by the qualified political party to vote for the qualified political party's candidates in a primary election").

[200] *Id.* § 20A-9-201(2)(a)(iii).

[201] *Id.* § 20A-9-202(5).

The URP's preferred caucus and convention method is still available to it. If a candidate succeeds at the convention, the URP "shall certify the name of the candidate to the [LG] before 5 p.m. on the first Monday after the fourth Saturday in April [April 25, 2016]."[202] Thus, the URP still retains its ability to hold a convention and certify winning candidates to the LG. Although the URP does not certify candidates directly to the general election ballot as it once was able to do, the URP has cited no case law establishing that it has a constitutional right to certify candidates to the general election ballot.[203] Instead, the URP's right to certify candidates is derived from the state, which has the power to mandate a primary election and regulate how the primary is structured.[204] Thus, although the URP is not able to certify convention candidates to the general election ballot, the URP has not shown that this is a right for which balancing is required.

Likewise, the URP's right to endorse any candidate it chooses is not affected by SB54. The URP is free to endorse any candidate participating in the convention, any candidate gathering signatures, or any candidate listed on a primary ballot. While it is true that the URP is not able to completely control who appears on the primary ballot, or choose who wins the primary election, the URP's ability to

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[202] *Id.* § 20A-9-407(6)(a).

[203] The URP Constitution Article XII, § 2(I) conflicts with Utah Code § 20A-9-409(4). The URP Constitution states that winners from the URP convention will "proceed to the general election," while the law states that winners from party conventions "shall participate in the primary election for that office."

[204] *Lopez Torres*, 552 U.S. at 202-03.

support or endorse a particular candidate is not affected. The URP's attempt to argue that it has an unfettered constitutional right to indicate its endorsement by controlling who appears on a primary ballot or who wins a primary election is not supported by case law. Instead, the case law establishes that a state may mandate a primary election and may enact reasonable regulations to structure the primary election.[205] The Utah Legislature has mandated a primary election in order to increase voter participation, and has allowed the URP to close its primary if it so desires. The URP has not shown that endorsement of a candidate is a right for which balancing is needed.

The URP may still hold a convention, campaign for candidates, fundraise, and endorse any candidate the URP chooses to support.[206] The URP is free to certify any candidate who wins at convention and during the election season may endorse any candidate it chooses. Nothing in SB54 takes these rights away. Thus, the URP is not entitled to relief under subparagraph 73(b)

The URP Does Not Have a Right to Communicate Its Endorsement on the General Election Ballot and the URP's Ability to Control the Use of Its Name and Emblem on the Ballot is Not Severely Burdened

As explained in the Order Denying Preliminary Injunction, "there is no protected free speech right to communicate the Party's endorsement on the general election ballot. Ballots serve primarily to elect candidates, not as forums for political expression."

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[205] *Id.*

[206] Order Denying Preliminary Injunction at 17.

[207]"The Supreme 'Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message.'"[208] Therefore, the URP is incorrect that it has a right to communicate its endorsement on the general election ballot.

Further, the URP retains significant control over the use of its name and emblem on the general election ballot because the URP alone decides who may vote in the URP primary.[209] Therefore, although the URP no longer is able to certify candidates directly from the convention to the general election ballot, which means a candidate may appear on the general election ballot as the representative of the URP who was not the winner in the convention, this does not constitute a severe burden on the URP. The URP still retains a significant amount of control over the use of its emblem by being able to decide who votes in the URP primary and by endorsing candidates.[210] The

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[207] Order Denying Preliminary Injunction at 17 (citing *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 453 n. 7 (2008) (citing *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 363 (1997))).

[208] Order Denying Preliminary Injunction at 17 (quoting *Nevada Com'n on Ethics* v. *Carigan*, 564 U.S. 117, 131 S.Ct. 2343, 2351 (2011) (quoting *Timmons*, 520 U.S. at 362-363; *Burdick* v. *Takushi*, 504 U.S. 428, 438 (1991))).

[209] Utah Code § 20A-9-406(1) (allowing QPP to "certify to the lieutenant governor the identity of one or more registered political parties whose members may vote for the qualified political party's candidates").

[210] It is unclear if the Lieutenant Governor's Office will place signature-gathering candidates on the ballot as a candidate of the political party they listed on their declaration of candidacy or if the signature-gathering candidates will appear on the ballot

URP is not entitled to relief under subparagraph 73(c).

The URP's Right to Choose a Candidate Selection Process is Not Severely Burdened

The URP erroneously believes that it has a constitutional right to choose its nominee only by convention. There is no constitutional right for a political party to choose its nominee exclusively by convention. Instead, the law is clear that the right to "choose a candidate selection process that will in [the political party's] view produce the nominee who best represents [the political party's] platform" is "circumscribed . . . when the State gives the party a role in the election process . . . ."[211] When that happens, the political party's action can be considered "state action," and the state acquires a "legitimate governmental interest in ensuring the fairness of the party's nominating process, enabling [the State] to prescribe what the process must be."[212] The U.S. Supreme Court has "considered it 'too plain for argument' that a State may prescribe party use of primaries or conventions to select nominees who appear on the general election ballot." [213] The URP has not shown its right to choose a candidate selection process is severely burdened.

Under SB54, the URP remains free to choose to be a QPP rather than an RPP. This important decision is left entirely up to the URP without any state

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with no party affiliation.

[211] *Lopez Torres*, 552 U.S. at 202-03.

[212] *Id.*

[213] *Id.*

interference. By choosing to be a QPP, the URP avails itself of the option to hold a convention. SB54 says nothing about how the URP convention must run. Rather, the URP is free to conduct its convention free from state interference. The candidates emerging from the convention are certified by the URP and appear on the URP primary election ballot. The URP has not identified any way in which the state interferes with the URP's right to choose this candidate selection process.

But the URP argues that is not enough. The URP argues that the signature gathering route circumvents the convention route and thereby undermines the URP's ability to choose the candidate selection process that it believes is best.[214] But as explained above, a political party does not have exclusive power over its candidate selection process. A state may mandate a primary for the selection of nominees and may enact reasonable regulations to conduct the primary.[215]

The addition of a signature route to the ballot may inconvenience the URP leadership or not be preferred by them. But this is the method the Utah Legislature chose to enact. It is a reasonable regulation within the state's general power to manage elections.[216] The URP is not entitled to relief under subparagraph 73(d).

The URP's Right to Control Internal Rules and Procedures is Not Severely Burdened

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[214] 41 URP MPSJ at 17.

[215] *Lopez-Torres*, 552 U.S. at 202-03.

[216] 75 Order at 35-36.

The URP also argues that SB54 seeks to control the URP's internal rules and procedures.[217] This argument is similar to the argument immediately above that SB54 impairs the URP's right to choose the candidate selection process the URP views as best. But there are additional aspects which will be addressed in this section.

The Undisputed Material Facts recite that the convention route is the only route the URP Constitution and Bylaws provide. There is no provision in the URP's Constitution and Bylaws that expressly allows a URP candidate to gather signatures. The URP argues that this lack of express authorization is its affirmative bar on gathering signatures.[218] But the URP is incorrect. The URP has failed to cite to any section of its Constitution, Bylaws, or "internal rules" that affirmatively prohibits signature gathering. Silence will not be interpreted as an affirmative bar.

The URP also argues, without any citation to the record or any supporting documentation, that it has "notified its members that it intends to select its candidates through the convention process rather than the signature gathering process[,]"[219]and has apparently informed URP candidates that "any person who seeks to avoid the convention selection process by declaring candidacy through the signature gathering process will be in violation of the Party

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[217] 41 URP MPSJ at 18-19 ("[T]he [LG] is seeking to undercut and eviscerate the [URP]'s candidate selection rules and internal processes . . . .").

[218] *Id. a*t 16

[219] *Id.* at 16-17.

rules and his or her membership [will be] revoked."[220] There is no indication that the URP's stated intention is supported in the URP Constitution, Bylaws, or any other written documentation, or that the URP has taken any affirmative step in revoking the membership of any URP member for declaring candidacy through the signature gathering process alone.[221] The URP's failure to show a clear party policy defeats its claim that SB54 burdens its internal processes.

In contrast to the URP's silence and inaction, state law expressly permits signature gathering.[222] When the Utah Supreme Court interpreted the Either or Both Provision to provide a right to the member to gather signatures,[223] it explained that allowing primary ballot access through signature gathering does not impermissibly interfere with the party's internal procedures:

> The Republican Party argues that our plain language construction of section 20A- 9-101(12)(d) would violate [Utah Code § 20A-9-401(2)[224]] by governing or regulating its

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[220] *Id.* at 17.

[221] April 13 Response at 49.

[222] Utah Code §§ 20A-9-101(12)(d) and -408; Utah Republican Party, 2016 UT 17, ¶ 4 ("[T]o meet the definitional requirements of a QPP, a political party must permit its members to seek its nomination by 'choosing to seek the nomination by either or both' the convention and the signature process.").

[223] Utah Republican Party, 2016 UT 17, ¶ 5.

[224] Utah Code §§ 20A-9-101(12)(d) and -408; Utah Republican Party, 2016 UT 17, ¶ 4 ("[T]o meet the definitional requirements of a QPP, a political party must permit its members to seek its

> internal procedures. We disagree. The statute does not require the Republican Party to seek certification as a qualified political party, and it does not purport to mandate the adoption of any provisions in its constitution, bylaws, rules, or other internal procedures. A registered political party that chooses to function as such incurs no obligation under subsection (12)(d). However, if a party seeks certification as a QPP, it must comply with the statute's requirements. This does not amount to internal control or regulation of the party by the State.[225]

As pointed out above, the URP may not enact rules or procedures contradictory to state regulation in the guise of membership regulation or control of internal procedure. For example, the stated URP intention to ban a member from nomination if that member fails to secure at least 40% of the delegate vote at convention[226] is directly contrary to state law[227] and is invalid. Even if the URP had enacted clear prohibitions on members' use of the signature gathering process, or provisions expelling members who use the process, those rules would be ineffective against valid state regulation of the election process because a state has a "legitimate governmental interest in ensuring the fairness of the party's

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nomination by 'choosing to seek the nomination by either or both' the convention and the signature process.").

[225] Utah Republican Party, 2016 UT 17, ¶ 6.

[226] April 13 Response at 49.

[227] Utah Code § 20A-9-101(12)(d) (allowing member to access ballot by gathering signatures).

nominating process, enabling it [the state] to prescribe what the process must be."[228] The U.S. Supreme Court has "considered it 'too plain for argument' that a State may prescribe party use of primaries or conventions to select nominees who appear on the general election ballot."[229]

Thus, a state has the authority to create the process by which candidates appear on the general election ballot, and does not interfere with a political party's internal procedures when it establishes laws regulating primary and general elections. Indeed, rather than interfering with the internal procedures of the party, SB54 gives the URP and all other QPPs considerable control over how they will govern themselves internally. And there is specific instruction in Utah Code § 20A-9-401 stating that the primary election provisions in the law "may not be construed to govern or regulate the internal procedures" of the URP.[230] Thus, there is no regulation of the URP's convention procedures, no limitations on membership requirements, no mandate to participate in the general election as a QPP or RPP, and no restriction on who the political party may endorse or support. Further, SB54 offers the URP the opportunity to control who votes in its primary election, to control who signs a candidate's petition, to object to a candidate's declaration of candidacy, and to assure that candidates are URP members. These

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[228] Lopez Torres, 552 U.S. at 202-03.

[229] *Id.*

[230] Utah Code § 20A-9-401(2) ("This part may not be construed to govern or regulate the internal procedures of a registered political party.").

factors minimize the burden on the URP's internal rules and procedures.

Accordingly, the URP is not entitled to relief under subparagraph 73(e). The URP's concern that its ability to select a "nominee who best represents [its] political platform" is slightly burdened, but "[i]t is unavoidable that election laws will impose some burden upon individual voters [and political organizations]."[231] The presence of a signature gathering route does not prohibit the URP from holding a convention and allowing delegates to select a nominee or two that will, theoretically, represent the URP's views. The URP delegates exercise this right. Now the delegates share the right to designate who appears on the primary election ballot with voters who the URP decides may vote in the party primary election. This is not unconstitutional, and the URP's internal rules must not contradict valid state law.[232]

The URP's Right of Association and Disassociation to Ensure that a Nominee is a Member of the URP and is Selected by a Majority of URP Members is Not Severely Burdened

The URP argues that the LG "has threatened to reject any objections made by the [URP] to the candidacy of persons who flaunt the [URP] rules and processes by using the signature gathering process

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[231] *Burdick*, 504 U.S. at 433.

[232] See *Greenville*, 824 F. Supp. 2d at 666 ("The statute clearly allows political parties to fashion party rules concerning party primaries, but those rules must be in accordance with and not in conflict with State law." (emphasis added)).

instead of the convention process" and that the LG "has informed the [URP] that he will certify such candidates as a [URP] candidate, notwithstanding the [URP]'s revocation of that person's membership . . . ."[233] The URP argues that the LG's position on this issue, "coupled with the [LG]'s present ability to [enforce that position] in his capacity as Chief Elections Officer for the State of Utah, has and will chill the First Amendment rights of the [URP] to freely associate with its members, and disassociate with those persons who refuse to abide by the [URP] rules."[234] The URP also argues that if the LG is able to certify signature- gathering candidates to the URP primary ballot, it "will dilute the [URP]'s influence and ability to participate effectively in the political process."[235]

The URP's concern that a nonmember may be selected as the URP's nominee is unfounded. SB207, a bill enacted in 2015 by the Utah Legislature, eliminates the URP's concern that its nominees may not be members of the Republican Party.[236]

There might be constitutional injury to the URP if the LG placed a candidate who was not a member of the URP on the ballot as a nominee of the URP. But no such scenario presents itself here. And in light of the valid implementation of the signature gathering

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[233] 41 URP MPSJ at 17.

[234] *Id.*

[235] *Id.*

[236] Order Denying Preliminary Injunction at 20; see Utah Code § 20A-9-201(2)(a)(iii) (stating that an individual may not "file a declaration of candidacy for a registered political party of which the individual is not a member . . . .").

process to fulfill an important state interest, the party may not disguise its rejection of that process as a membership rule or internal process control.

The URP correctly identifies the possibility that a candidate may win the primary election with less than a majority vote.[237] However, as in the First Lawsuit,[238] the URP has failed to present legal authority indicating that there is any constitutional guarantee that a party's candidate may only gain access to the general election ballot based on a majority vote. Therefore, the URP is not entitled to relief under subparagraph 73(f).

The URP's Right of Free Speech to Ensure Nominees Commit to URP Platform is Not Severely Burdened

The URP asserts that it has a right to ensure that nominees commit to the URP Platform,[239] but does not cite any legal authority for this proposition.[240] Furthermore, it is undisputed that SB54 does not interfere with the URP's policy of requiring URP candidates running for "any federal or statewide office" to "sign and submit a certification . . . and a disclosure statement."[241] The certification states that the candidate "will comply with the rules and processes set forth in the Utah Republican Party

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[237] URP Complaint ¶ 73(f).

[238] Order Denying Preliminary Injunction at 20.

[239] URP Complaint ¶ 73(g).

[240] See 41 URP MPSJ.

[241] URP Bylaws at § 8.0(A).

Constitution and these Bylaws . . . ."[242] The disclosure statement must state that either: (1) "I have read the Utah Republican Party Platform. I support that Platform and accept it as the standard by which my performance as a candidate and as an officeholder should be evaluated. I certify that I am not a candidate, officer, delegate nor position holder in any party other than the Republican party [sic]." Or (2) "I have read the Utah Republican Party Platform. Except for the provisions specifically noted below, I support that Platform and accept it as the standard by which my performance as a candidate and as an officeholder should be evaluated. I certify that I am not a candidate, officer, delegate nor position holder in any party other than the Republican party [sic]."[243]

Thus, the URP Bylaws require URP candidates to state their adherence to the URP Platform and nothing in SB54 limits the URP requirement. The URP is not entitled to relief under subparagraph 73(g).

There is No Severe Burden on URP's Asserted Rights

It is true that the enactment of SB54 changed election laws in the State of Utah. But "the mere fact that a State's system 'creates barriers . . . does not of itself compel close scrutiny.'"[244] The character and magnitude of each of the alleged rights identified by the URP has been analyzed, and when the actual URP rights are measured against the interests offered by the LG as justifications for the burdens imposed—

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[242] *Id.*

[243] *Id.*

[244] Burdick, 504 U.S. at 433 (internal citations omitted).

increasing candidate access to the ballot and increasing voter participation—the burdens do not rise to the "severe" level. Thus, the State's important regulatory interests in managing elections in a controlled manner and increasing participation are sufficient to justify the reasonable requirement of access to the primary election ballot through signature gathering.

SB54 is Not the Product of Invidious Discrimination

The URP argues that it and its members "have a fundamental right to associate and exercise their constitutional rights without being discriminated against based on their allegedly 'extreme' viewpoints."[245] The URP argues that "[u]nder the First Amendment, the government is prohibited from regulating speech 'when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.'"[246] The URP argues that "even under rational-basis review, . . . a law must still have a legitimate purpose" and that "[a]ny legislative motive qualifying as animus is never a legitimate purpose."[247] The URP argues that "once animus is detected, the inquiry is over: the law is unconstitutional."[248]

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[245] 41 URP MPSJ at 19 (citing *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995)).

[246] 41 URP MPSJ at 19-20 (citing *Rosenberger*, 515 U.S. at 829).

[247] 41 URP MPSJ at 20 (citing *Bishop* v. *Smith*, 760 F.3d 1070, 1103 (10th Cir. 2014)).

[248] 41 URP MPSJ at 20 (internal quotation marks omitted) (quoting *Bishop*, 760 F.3d at 1103).

While the URP correctly states that animus is not a legitimate purpose for enacting a law, the URP has not shown evidence of animus. The purpose of SB54 is to "ensure full opportunity for persons to become candidates and for voters to express their choice."[249] The Undisputed Material Facts do not show that the URP was targeted or singled out because of its "extreme" viewpoints. Indeed, this argument makes no sense. A majority of the members of the Utah Legislature are members of the URP and it is hard to believe that they would target their own party or the viewpoints their party advances. Furthermore, the URP fails to show how SB54 applies differently to the URP than to other QPPs. All QPPs under SB54 are subject to the same regulations. The "invidious discrimination" argument is rejected on the additional grounds stated in the LG Opposition.[250]

Severability Need Not Be Considered

No provision of the Utah Code is altered by this Memorandum Decision and Order.

Therefore, there is no need to address the severability arguments raised by the 41 URP MPSJ.

CONCLUSION

Because neither claim preclusion nor issue preclusion apply to bar URP from pursuing its claims under subparagraphs 73(b) through (g), the

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[249] Utah Code § 20A-9-401(1).

[250] LG Opposition at 18 (describing Anderson-Burdick test and stating that the URP's equal protection challenge "rises or falls on the Court's determination of whether [the URP] has presented evidence to demonstrate the statute severely burdens the [URP]'s constitutional rights"). No severe burden is found here.

preclusion arguments fail. This conclusion fully resolves the 37 UDP MJP and the 38 LG MJP. Accordingly, those motions are denied.

Additionally, the URP has failed to establish that SB54 imposes a "severe" burden on any of the alleged rights asserted in subparagraphs 73(b) through (g). To the extent any of those alleged rights are actual constitutional rights, the burden imposed on the URP is not significant and is amply supported by the State's interest in maintaining an orderly election and ensuring increased ballot access and voter participation. The URP's invidious discrimination argument also fails. Accordingly, the URP has failed to establish that it is entitled to summary judgment under subparagraphs 73(b) through (g). The 41 URP MPSJ is denied.

Notice and a reasonable time to respond have been given under Rule 56(f). Therefore, partial summary judgment is granted in favor of the LG and against the URP on the issues raised in the 41 URP MPSJ. Specifically, the LG is entitled to summary judgment that SB54 does not severely burden any of the asserted rights alleged in subparagraphs 73(b) through (g).

Declaratory judgment as to the constitutionality of the Either or Both Provision is appropriate.

ORDER

IT IS HEREBY ORDERED that the 37 UDP MJP[251] is DENIED. IT IS FURTHER ORDERED that the 38 LG MJP[252] is DENIED. IT IS FURTHER ORDERED that the 41 URP MPSJ[253] is DENIED.

IT IS FURTHER ORDERED that partial summary judgment is GRANTED for the LG under Rule 56(f) on the issues raised in the 41 URP MPSJ. SB54 does not severely burden any of the asserted rights alleged in subparagraphs 73(b) through (g) of the URP Complaint.

DECLARATORY JUDGMENT

Declaratory judgment is entered that Utah Code § 20A-9-101(12)(d), which allows candidates for public office to choose to access the primary election ballot by signature gathering, by participating in a party's convention, or both, does not impair the URP's constitutional rights but is a legitimate exercise of the state's power to regulate elections.

Dated April 15, 2016.

BY THE COURT:

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[251] Utah Democratic Party's Motion for Judgment on the Pleadings and Memorandum in Support Thereof ("37 UDP MJP"), docket no. 37, filed Feb. 12, 2016.

[252] Defendant's Motion for Judgment on the Pleadings and Memorandum in Support ("38 LG MJP"), docket no. 38, filed Feb. 12, 2016.

[253] Utah Republican Party's Motion for Partial Summary Judgment on Subparagraphs 73(b)-(g) ("41 URP MPSJ"), docket no. 41, filed Feb. 17, 2016.

David Nuffer
United States District Judge