

Nos. 16-4091, 16-4098

**United States Court of Appeals
for the Tenth Circuit**

Utah Republican Party,
Plaintiff-Appellant,

Utah Democratic Party,
Plaintiff Intervenor,

v.

Spencer J. Cox, in his official capacity as Lieutenant Governor of Utah,
Defendant-Appellee

Appeal from the United States District Court for the District of Utah
Civil Case No. 2:16-cv-00038 (Judge David Nuffer)

**Proposed Reply Brief Supporting Petition for Rehearing or
Rehearing *En Banc***

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Utah Republican Party is an incorporated not-for-profit association.

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INTRODUCTION

Lieutenant Governor Cox is obviously uncomfortable with the majority's conclusion that a government can regulate an expressive association despite evidence—which must be credited at this stage—that the regulation was designed to shape the organization's message. That explains why he begins by trying to defend the majority's decision on the *alternative* ground that a party's nomination system really belongs to the State—as when (at 1) he accuses appellant Utah Republican Party of arguing that “parties have a First Amendment right to dictate how *States* run *their* nomination procedures.”

But the notion that a party's nomination procedures belong to the State is fundamentally misguided. It is foreclosed by the Supreme Court's teaching in *N.Y. Bd. of Elections v. Lopez Torres* that “[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,” 552 U.S. 196, 202 (2008). It is also foreclosed by the Court's teaching in *California Democratic Party v. Jones* that the First Amendment grants “special protection” to “the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences.” 530 U.S. 567, 575 (2000).

Cox’s attempts to defend the majority’s reasoning fare no better. Like the just-exposed charlatan in *The Wizard of Oz*, he urges the Court to “pay no attention” to the extensive evidence of SB54’s purpose and effect. That evidence shows that SB54 was designed to promote “competing philosophies” to challenge the views of candidates selected by the Party’s own candidate-selection mechanism, thereby changing the party’s message. Contrary to Cox, that evidence is all cited or included in the record and/or subject to judicial notice. At a minimum, it precludes summary judgment in Cox’s favor. And Cox’s repetition of the majority’s argument that regulation of a party’s candidate-selection procedures is only “minimally burdensome” because it deals only with “external” relationships is foreclosed by the above-quoted teachings from *Lopez Torres* and *Jones*.

Cox attempts to evade the second question—a legal question about *how* a court determines a regulation’s impact on a voluntary expressive association—by reframing it as a narrow, fact-specific question about the impact of SB54. In so doing, Cox effectively admits that the panel was wrong on that issue as well.

ARGUMENT

I. Cox fails to undermine the Party’s and Judge Tymkovich’s showing that Question 1 merits reconsideration.

A. Having won summary judgment, Cox cannot avoid the substantial evidence of SB54’s effect on the Party’s message.

Like Chief Judge Tymkovich’s dissent, the Party’s petition demonstrated that SB54, while facially a procedural reform, was a substantive attack on the Party’s choice of candidates and their political views. *E.g.* Pet.11–12. Question 1 thus asks this Court to decide whether such a substantive reform violates the First Amendment.

1. Cox’s attacks on the evidence cited by the dissent and the petition ignore the applicable standard of review. He moved for judgment on the pleadings, which the district court converted to a motion for summary judgment under Rule 56(f) and granted, and which the divided panel affirmed. *See Maj.8–9, 29.* This court reviews a summary judgment ruling “*de novo*, applying the same legal standard used by the district court.” *Harrison v. Wahatoyas*, 253 F.3d 552, 557 (10th Cir.2001).

The relevant standard is therefore Rule 56, which allows a court to grant summary judgment only if, viewing the evidence in the light most favorable to the non-moving party, no material issue of fact is disputed.

E.g., Id.. Thus, summary judgment was properly granted to Cox only if there is no evidence that, when interpreted in the light most favorable to the *Party*, could allow a finding for the *Party* on its First Amendment claim. Cox has not even tried to meet this standard; indeed, he could not do so with a straight face.

2. Contrary to Cox, unrefuted record evidence and materials subject to judicial notice demonstrate that CMV and the Legislature intended to change the *types* of candidates the *Party* nominates and, hence, the *Party's* message. The record is clear that CMV was focused on changing the *Party's* priorities and messaging.” J.A. 59. Specifically, CMV promised to reduce the *Party's* “power,” to promote less “extreme views,” making *Party* nominees less responsive to the *Party*. Count My Vote, Why Change Utah’s Election System?, <http://www.countmyvoteutah.org/facts>, cited in, e.g. JA 59; URP Supplemental Appendix 72 (affidavit); Dissent 5 n.3; Pet. 13 n.6

Cox tries to distinguish CMV’s intent from the Legislature’s intent. But courts have repeatedly recognized that, when an outside group drafts

legislation, the group's intent is relevant to determining legislative intent. *E.g.* *United States v. Oregon*, 366 U.S. 643, 648 (1961).¹

Here, the relevance of CMV's intent is highlighted by the undisputed fact that SB54's language was almost exclusively drafted by Count My Vote. *See, e.g.*, JA60 (attachment to complaint); URP App.72 (affidavit). Indeed, the proposed initiative—subject to judicial notice under FRE 201—shows that SB54 incorporated the ballot initiative's proposed changes to Utah Code §§ 20A-6-301, -302; 20A-9-101, -403, -405, -701, with only added definitions and stylistic and technical corrections.

Compare Count My Vote Citizens' Petition Initiative, available at: <http://bit.ly/2013CMV>.

Moreover, the history surrounding the introduction of CMV's proposal to the Legislature confirms SB54's intent. As the petition and dissent explain in greater detail, SB54's legislative sponsor stated that SB54 was designed to promote “competing philosophies” within the

¹ The only case Cox cites for the contrary position is *Holland v. Dist. Court, Cty. of Douglas*, 831 F.2d 940, 943 (10th Cir.1987). But that decision says only that the text is the “*best* evidence of legislative intent,” *id.*, not that it is the *only* evidence or the *dispositive* evidence.

Republican Party—i.e., to elevate philosophies that differ from those of the Party’s elected neighborhood delegates. Pet.12 n.4; Dissent 20 n.12.

Cox also ignores the real-world experience demonstrating that CMV got the substantive reform that it wanted. As explained in the petition (at 12), SB54 has already forced the Party to have as its nominees candidates who were rejected by the caucus system, and who have disagreed with the Party on fundamental issues.

All these materials are properly subject to judicial notice, and almost all are cited in the record. *See, e.g.*, JA45 (citing Count My Vote’s website); URP App.29 (statement by Senator Bramble); *id.* at 72 (affidavit citing website); Fed.R.Evid. 201.

3. Unable to point to statements from CMV or the Legislature disavowing the substantive nature of CMV’s proposed reforms, Cox tries to hide behind other facts. Because CMV also put forward “an initiative that would have eliminated the caucus-convention [nomination] system” altogether, Cox contends that “SB54 *saved* the caucus-convention system.” Opp.16, 18 (emphasis in original). But if a state *completely* eliminated a caucus system in favor of a primary in order to substantively

change a party’s nominees, that too would violate the First Amendment for all the reasons explained here and in the petition. It is no defense to a First Amendment claim to say, “We could have burdened your rights even more egregiously.”²

In any event, this is at best a jury argument. It doesn’t establish Cox’s entitlement to summary judgment. Moreover, if the Party has not yet provided sufficient evidence of SB54’s intent and/or effect to warrant summary judgment for the Party, the Party must be allowed to develop and present such evidence at trial.

B. Like the panel, Cox is wrong to claim that regulation of “external” matters like candidate selection is only “minimally burdensome” as a matter of law.

Like the panel, Cox argues in the alternative (at 10–12) that this case really turns on “distinctions between a party’s external and internal affairs,” and that regulation of “external” affairs is only “minimally burdensome.” But that argument ignores *Jones*’ teaching that “a party’s

² For this reason, notwithstanding Cox’s contrary argument (at 18–20), the risks to political parties across this Circuit are clear. At a minimum, as explained in the petition (at 12), the states in this Circuit that still have Presidential caucuses could face procedural reforms designed to change the state party’s choice of nominee and hence its messages.

choice of a candidate”—an external matter—“is the most effective way [to] communicate to the voters what the party represents and, thereby, attract voter interest and support.” 530 U.S. 567, 575 (2000). It follows that the burden of a regulation systematically impairing a party’s “choice of a candidate”—as SB54 does—is at least “substantial” within the meaning of the *Anderson-Burdick* test, not “minimal” as the panel concludes, *see Maj.12, 20.*

That conclusion also follows from *Lopez Torres*’ statement that “[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.” 552 U.S. at 202 (emphases added). For that reason too, Cox’s suggestion that SB54’s significant and systematical changes to the party’s “candidate-selection process” is only a “minimal” burden on First Amendment rights is ludicrous.

Like the panel, Cox hides behind *dicta* from *Jones* and other cases that states “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.*” *E.g. Jones*, 530 U.S. at 572 (emphasis added). But the *dicta* do not apply here: First, those *dicta* do not support the

majority's conclusion that such a requirement imposes at most a "minimal" burden on a party's First Amendment rights. Second, in this case there is no dispute that the Party's pre-SB54 nomination mechanism actually resolved "intraparty competition," or that it did so "in a democratic fashion." SB54 therefore wasn't necessary to the achievement of those goals. Instead, as established by the evidence (at least sufficiently to prevent summary judgment), SB54 was designed to nudge the party's chosen candidates toward "competing philosophies"—that is, philosophies different from those embraced by those who actively participate in the Party's democratic caucus-convention system. As explained above, there is no way to reconcile that objective with the Supreme Court's consistent teaching that "[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.

Clingman v. Beaver, 544 U.S. 581 (2005), provides even less support for Cox and the majority. Supported by a coalition of *amici* states (represented by undersigned counsel) that Utah joined, *Clingman* rejected a First Amendment challenge to a state law mandating closed or

semi-closed primaries. *Id.* at 584–586, 598. But it did so in large part to protect major parties’ own First Amendment right to avoid having *their* primaries “raided”—and the resulting messages skewed—by minor parties in an open primary. *See id.* at 594–597. Neither *Clingman* nor the states’ *amicus* brief remotely supports Cox’s sweeping generalization (at 8) that “States do not violate the Constitution by setting rules for how parties must (or must not) nominate general election candidates ...” Again, that statement is flatly contrary to *Lopez Torres* and *Jones*.

Indeed, SB54 facilitates a practice akin to the party raiding condemned in *Clingman*. Under SB54, Utahns who nominally register as Republicans but do not invest in neighborhood caucuses or embrace the views of the Party (as stated in its platform and developed by neighborhood-elected delegates) can put their own candidates on the ballot as the Party’s candidates. And they can do so in order to *oppose* the candidates selected to represent the Party’s own political positions, developed through the Party’s own processes. Because SB54 facilitates a form of the party raiding *Clingman* condemns, Cox’s attempt to rely on that decision turns it on its head.

II. Cox fails to undermine the Party’s showing that Question 2 merits rehearing.

Cox does no better when addressing Question 2. As explained in opening, that question is whether, “when assessing the burden of a law on an expressive association’s First Amendment rights,” a court can—as the panel majority did—“disregard the law’s impact on the association itself, as determined by its duly constituted leadership,” and instead examine “the law’s impact on the association’s rank-and-file members.” Pet. iii. As shown in the petition (at 23–25), this question is vital to all expressive organizations.

1. Cox ignores the majority’s core holding (at 21–22) that the Party’s First Amendment rights are not burdened if its rank-and-file membership wouldn’t recognize the burden. Instead, Cox asserts the second question concerns merely the “ability” of the “party leadership ... to *speak* for the organization, regardless of the views of its members.” Opp.24 (emphasis added; misquoting Pet.19).

But that is not the question. Question 2 addresses *how* a court determines the burden of a particular regulation “on an expressive association’s First Amendment rights.” Pet.iii. The Party does not deny

that SB54 leaves the Party’s leadership some “ability” to “speak for the organization.” Opp.24. But that doesn’t resolve the Party’s challenge to this aspect of the majority’s decision, which goes to the majority’s analytical method for assessing the nature and extent of SB54’s burden on the Party’s First Amendment rights, particularly the right of expressive association. *See* Pet.21–22. Cox’s observation that party leaders may “speak for the organization” has nothing to do with that question. By refusing to defend the panel’s position on this issue, Cox effectively admits that the second question requires this Court’s review.

Cox’s dismissal of the case law is likewise incorrect. He contends (at 24) that *Boy Scouts of America v. Dale*, 530 U.S. 640, 655 (2000) and Judge Hartz’ concurrence in *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1149 (10th Cir.2013) (en banc), cast no doubt on the majority’s analysis. But Cox’s sole argument for this point is that Party leaders can still “speak for the organization.” Since that point is undisputed and thus irrelevant, Cox has failed to rebut the petition’s showing that the cited decisions also require reversal of the panel decision. See Pet.19–23.

2. Cox also does not dispute Question 2’s importance to political parties. And his claim (at 23) that a disclaimer by the majority in one

footnote (at 16 n. 6) prevents this aspect of the panel opinion from affecting the First Amendment rights of non-political associations ignores the majority's logic. The majority's method for assessing First Amendment burdens logically extends to all expressive associations—including advocacy groups and churches—for all the reasons explained by Chief Judge Tymkovich's dissent and the petition. *E.g.* Dissent 14; Pet.23–25.

CONCLUSION

The majority's decision violates the Party's First Amendment rights and threatens the First Amendment rights of many other expressive associations in this Circuit. Rehearing or rehearing *en banc* should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will notify counsel for Appellee Spencer J. Cox and Plaintiff-Intervenor Utah Democratic Party.

/s/ Gene C. Schaerr

Attorney for Utah Republican Party

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 2,449 words, excluding the parts listed in Rule 32(f). I further certify that the foregoing complies with the typespace and typestyle requirements of Rules 32(a)(5), and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Size 14 Century Schoolbook font.

/s/ Gene C. Schaerr

Attorney for Utah Republican Party

CERTIFICATE OF DIGITAL COMPLIANCE

I, Gene C. Schaerr, certify that, in relation to the Proposed Reply Brief Supporting Petition for Rehearing or Rehearing *en banc* filed in *Utah Republican Party v. Cox*, Nos. 16-4091 and 16-4098, that:

(1) all required privacy redactions have been made (see 10th Cir. R. 25.5), (2) any required paper copies to be submitted to the court are exact copies of the version submitted electronically (see ECF User Manual, Section II, Policies and Procedures for Filing Via ECF, Part I(b), pages 11-12) and, (3) the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses (see ECF User Manual, Section II, Policies and Procedures for Filing Via ECF, Part I(b), pages 11-12).

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