IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTAH REPUBLICAN PARTY, Plaintiff-Appellant, and UTAH DEMOCRATIC PARTY, Plaintiff-Intervenor-Appellant, vs. SPENCER J. COX, in his official capacity as Lieutenant Governor of Utah, Defendant-Appellee.	**Nos. 16-4091, 16-4098**

BRIEF IN OPPOSITION TO PETITION FOR REHEARING OR REHEARING EN BANC

On appeal from the United States District Court for the District of Utah
The Honorable David Nuffer
No. 2:16-CV-38-DN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Rules

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

In asking this Court to reconsider Senate Bill 54's constitutionality, the Utah Republican Party seeks an unprecedented outcome. URP wants this Court to be the first in 229 years of American jurisprudence to hold that the First Amendment prohibits States from (1) requiring political parties to nominate their general-election candidates by primary election, and (2) allowing candidates to qualify for the primary ballot by nomination petition. Nothing justifies that unprecedented request.

First, URP cites no case adopting either holding. On the contrary, the Supreme Court's recent decisions acknowledge the States' ability to pass laws just like SB54. Other recent decisions also reject political parties' arguments that parties have a First Amendment right to dictate how States run their nomination procedures. URP's requested relief cannot be reconciled with those cases.

But according to URP, this case is different because of evidence showing that the Utah Legislature adopted SB54 to change URP's message and candidates. Yet URP's "evidence" of supposed legislative intent isn't evidence at all. Instead, it's mostly extra-record material

that URP culls from the public domain surrounding four years of debate and litigation over SB54. And URP's selected compilation omits other material, extra-record facts, which the panel majority correctly concludes show that the Utah Legislature adopted SB54 to *save* the caucus-convention system.

URP also contends that unless reviewed, the panel opinion will embolden other States to mandate primary elections in lieu of conventions. But every other Tenth Circuit State *already* mandates nominations by primary *and* allows candidates to qualify for the ballot by nomination petition (or by merely applying to run). So instead of protecting the status quo, rehearing would put the longstanding nomination processes of *every Tenth Circuit State* squarely in the crosshairs—during an election year. The harms that would work on Tenth Circuit States' sovereign interests cannot be overstated.

Finally, URP contends that without rehearing, the panel opinion will degrade other associations' First Amendment rights. But the panel opinion itself precludes that result. It expressly notes the distinction the Supreme Court's cases draw between the States' ability to regulate (1) elections and the parties participating in them, and (2) other

associations' activities. This case falls solely on the former side of that divide—and adheres to the Court's well-established rules in that realm.

In short, URP wants this Court to become the first American court to hold that the First Amendment lets parties veto both nominations by mandatory primary elections and nomination petitions. That request arises in an evidentiary vacuum and would, in an election year, upend the existing nomination processes in every Tenth Circuit State. If that satisfies 10th Cir. R. 35.1's standards, every rehearing petition does.

Chief Judge Tymkovich's dissent makes the best case for URP's position. That dissent already has been "circulated to the full court and every judge on the court [has been] given an opportunity to comment." 10th Cir. R. 35.1(A). Nothing in URP's petition adds to that dissent. The Court should deny URP's petition and finally clear the way for URP to seek Supreme Court review.

REASONS FOR DENYING THE PETITION

En banc review is an "[e]xtraordinary" and "disfavored" procedure that's potentially warranted only when a panel opinion conflicts with Supreme Court or circuit precedent, or a case presents "an issue of

exceptional public importance." 10th Cir. R. 35.1(A). Neither reason exists here.

URP's petition shows no conflict between the panel opinion and Supreme Court precedent—or, for that matter, precedent from any court. And the premises in URP's new questions (Pet. iii) are false, making any conclusions URP asks this Court to draw from them necessarily false too. URP's petition should be denied.

I. The Panel Opinion Comports with Supreme Court Precedent.

URP's petition cites no case holding that States violate the First Amendment by requiring parties to nominate general-election candidates through primary election, or by letting candidates qualify for the primary ballot through petition. And the State could not find a case so holding. By itself, that justifies denying URP's petition. *See* 10th Cir. R. 35.1(A). In any event, URP's contentions do not warrant rehearing.

A. States That Let Political Parties Designate Their Candidates on a General-Election Ballot Can Require Those Parties to Nominate Candidates by Primary Election.

1. URP first contends that *California Democratic Party v. Jones*, 530 U.S. 567 (2000), "forecloses the majority's holding." Pet. 8. Not so.

Jones presented only one question: whether a State "may, consistent with the First Amendment to the United States Constitution, use a so-called 'blanket' primary to determine a political party's nominee for the general election." 530 U.S. at 569. In a blanket primary, any voter—even a voter "not affiliated with any political party"—can vote "for any candidate regardless of the candidate's political affiliation." *Id.* at 570 (internal quotation marks omitted). *Jones* held that blanket primaries impose a severe burden on political parties' association rights by "forc[ing]" them "to adulterate their candidate-selection process—the 'basic function of a political party'—by *opening it up to persons wholly unaffiliated with the party*." *Id.* at 581 (citation omitted; emphasis added).

The political parties in *Jones* did not contend, as URP does, that non-blanket primaries violated their association rights. So, *Jones*'s holding governs only *who participates* in nominating a party's candidate by primary, not *how* those nominations occur. *See id.* at 581-82.

Under *Jones*, States cannot force parties to let non-party-members participate in picking the party's nominees. Because of URP's partial win in its first lawsuit, SB54 no longer does that; political parties in

Utah now retain exclusive control over who—party members or the public at large—nominates their candidates. *See* Op. 5-6, 21, 24. Accordingly, "SB54 is perfectly compliant with the holding in *Jones*." *Id.* at 24.

2. The panel opinion also comports with three unbroken lines of Supreme Court precedent about primary elections.

a. At least three cases in the first line of precedent say, without expressly holding, that States may do exactly what SB54 does: require parties to nominate candidates through primary elections. In fact, the Supreme Court has called it "too plain for argument" that a State "may *insist* that intraparty competition be settled before the general election by primary election or by party convention." *Am. Party of Texas v. White*, 415 U.S. 767, 781 (1974) (emphasis added); *see also Jones*, 530 U.S. at 572 ("consider[ing] it 'too plain for argument' . . . 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" (quoting *White*, 415 U.S. at 781)); *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 203 (2008) ("a State may prescribe party use of primaries or conventions to select nominees who

appear on the general-election ballot"). *Lopez Torres* even says that Supreme Court precedent "permit[s] States to set their faces against 'party bosses' by *requiring* party-candidate selection through processes more favorable to insurgents, *such as primaries*." *Id.* at 205 (emphasis added).

URP begrudgingly acknowledges those statements but tries to bury them as "*dicta*" (Pet. 10) applicable only "in some circumstances" (*id.* at 9). Yet as the panel correctly concludes (Op. 16-19, 23), SB54 could not fall more squarely within the space that *White*, *Jones*, and *Lopez Torres* carved out for this *precise* circumstance—the Utah Legislature's decision to "requir[e]" a "primar[y]." 552 U.S. at 205. And "in any event, whether the Court's reasoning" in *White*, *Jones*, and *Lopez Torres* "was dicta [did] not affect" the panel's "analysis because this court considers itself 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." *Indep. Inst. v. Williams*, 812 F.3d 787, 798 n.13 (10th Cir. 2016) (internal quotation marks omitted). This principle, the panel noted, was "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." Op. 17.

The panel opinion correctly adheres to this Court's practice of following the Supreme Court's recent, uniform statements and correctly relies in part on those statements to reject URP's claims. *Id.* at 16-18. By so holding, the panel opinion comports with the only other circuit decision addressing this same constitutional question. *See Alaskan Indep. Party v. Alaska*, 545 F.3d 1173 (9th Cir. 2008). An en banc opinion reversing the panel would squarely conflict with the Ninth Circuit's opinion, justifying Supreme Court review.

b. The second line of precedent holds that States do not violate the Constitution by setting rules for how parties must (or must not) nominate general-election candidates—even when political parties chafe at those rules. The Court upheld Minnesota's rule that parties could not nominate "fusion" candidates—one candidate nominated by two parties. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357-63 (1997). And it reversed this Court and upheld Oklahoma's "semiclosed primary system, in which a political party may invite only

its own party members and voters registered as Independents to vote in the party's primary." *Clingman v. Beaver*, 544 U.S. 581, 584 (2005).

The parallels between the losing political parties' arguments in *Timmons* and *Clingman*, and URP's arguments here, are striking. Each complained that the First Amendment requires the State to allow the party's preferred nomination method, be it fusion candidacy, *Timmons*, 520 U.S. at 353-55; or letting all registered voters (of any party) vote in its primary, *Clingman*, 544 U.S. at 584-56; or convention only, Op. 3.

Timmons and *Clingman* thus support the panel's decision. The First Amendment no more requires nomination only by party convention than it requires nomination by fusion candidacy or open primary. For if (as *Timmons* and *Clingman* held) the First Amendment does not require a State to run its chosen nomination process using the party's preferred rules, neither does the First Amendment require a State to use the party's preferred nomination process in the first place.

URP's petition ignores *Clingman*. That is puzzling given both the panel's correct reliance on *Clingman* (Op. 18-19) and Utah's role in *Clingman* itself. When that case reached the Supreme Court, Utah and seven other States supported Oklahoma as *amici curiae*, both on brief

and at oral argument. Utah "strongly oppose[d]" the Libertarian Party's attempt "to interfere with the States' organization and management of state-funded primary elections," which "is a core aspect of state sovereignty." Br. for States of South Dakota, Utah, et al. as *Amici Curiae* Supporting Pet'rs at 1, *Clingman v. Beaver*, 544 U.S. 581 (2005) (No. 04-37), 2004 WL 2681537. Utah noted its "strong interest in preserving the cohesion, integrity and effectiveness of the political parties in both fielding candidates and in fostering voter participation in elections." *Id.* at 3. And Utah emphasized its desire to "preserv[e] [its] legislature['s] ability to adopt" a semiclosed primary "in the future, if [Utah] conclude[s]" a primary "is needed to further the cohesion and effectiveness of the political parties operating in" Utah. *Id.*

Because it accepted Utah's arguments, *Clingman* precludes URP's renewed attempt to squash Utah's primary altogether.

3. The third line of precedent distinguishes permissible State regulation of a party's participation in electoral processes from impermissible State regulation of a party's internal affairs.

As to the former, it is "clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce

election- and campaign-related disorder." *Timmons*, 520 U.S. at 358. The "Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl.1, which power is matched by state control over the election process for state offices." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). That's why a political party's right "to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform" is "circumscribed . . . when the State gives the party a role in the election process." *Lopez Torres*, 552 U.S. at 202-03. Utah has done that "by giving [URP] the right to have [its] candidates appear with party endorsement on the general-election ballot." *Id.* at 203. Utah is thus "enabl[ed] . . . to prescribe what" the nomination "process must be." *Id.*

Even so, URP's "government, structure, and activities enjoy constitutional protection." *Timmons*, 520 U.S. at 358. URP must retain "discretion in how to organize itself, conduct its affairs, and select its leaders." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 230 (1989).

URP retains that discretion under SB54, as the panel majority correctly and exhaustively explained. *See* Op. 13-19. Unlike the California law challenged in *Eu*, SB54 does not dictate what URP's "'official governing bodies'" shall be; or limit URP's right to endorse candidates; or dictate the size, composition, or maximum term of URP's committees or leaders. *See* 489 U.S. at 217-18. Those distinctions between a party's external and internal affairs are "at the heart of this case." Op. 14. The panel majority strictly observed them and limited its holding accordingly. URP's contrary protestations misread or disregard the majority's careful analysis.

B. URP's Claims About the Legislature's Intent Behind SB54 Do Not Justify Rehearing.

URP imbues its petition with assertions that SB54 is unconstitutional because the Utah Legislature passed it to change URP's political message or candidates. That contention does not withstand scrutiny; no record evidence shows anything of the kind.

1. URP contends at least 11 times that "record evidence" shows the Legislature intended SB54 to change URP's political message or

candidates.[1] But only five of those eleven contentions cite to that supposed record evidence. *See* Pet. 4, 5, 7, 11-12, 13. And those five citation sentences include only four sources.[2] All told, the "evidence" URP cites consists of (1) pages 57-59 in the Joint Appendix (three citations); (2) legislative floor debate on SB54 (one citation); (3) the website of Count My Vote, a private organization that supported SB54 (two citations); and (4) the dissenting opinion (six citations).

And digging deeper, only two of those six pages in the dissent themselves contain citations. But neither page cites anything that URP's petition does not repeat.[3]

In sum, the corpus of what URP calls "evidence" supporting its allegations of the Legislature's intent falls into three categories: (1) pages 57-59 of the Joint Appendix (four total cites between petition

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[1] *See* Pet. at iii, 4 (two assertions), 5, 7, 8, 11, 11-12, 13 (two assertions), 14.
[2] *See* Pet. 4 (citing J.A. 57-59 and Dissent at 20 n.12, 24); *id.* at 5 (citing Dissent at 1); *id.* at 7 (citing Dissent at 10, 42 n.27); *id.* at 11-12 (citing J.A. 57-59, a page on Count My Vote's website, Dissent at 16 n.9 & 20 n.12, and legislative floor debate on SB54); *id.* at 13 (citing J.A. 59 and a page on Count My Vote's website).
[3] *See* Dissent at 16 n.9 (citing J.A. 57-59 and a page on Count My Vote's website); *id.* at 20 n.12 (a page on Count My Vote's website and legislative floor debate). The four remaining pages in the dissent that URP cites do not contain similar citations. *See* Dissent at 1 (not citing the record); *id.* at 10 (same); *id.* at 24 (same); *id.* at 42 n.27 (citing cases but not the record).

and dissent), (2) legislative floor debate on SB54 (two such cites), and (3) some pages on Count My Vote's website (four such cites). Consider each in turn.

a. Pages 57-59 of the Joint Appendix are pages of the verified complaint from URP's first lawsuit, which URP attached as an exhibit to its second complaint. But the allegations on those pages do not describe *legislative* intent. They describe only interactions between two private groups—Count My Vote and the Utah Republican Party—in the build-up to the 2014 Utah legislative session. No allegations in those three pages manifest personal knowledge of why any legislator voted for SB54—much less personal knowledge of why *every* legislator who supported SB54 did so. *See Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1019 (10th Cir. 2002) (allowing a district court to "treat a verified complaint as an affidavit for purposes of summary judgment if it satisfies the standards for affidavits set out in" the civil rules, including that the allegations "must be made on personal knowledge") (internal quotation marks omitted).

b. Supreme Court precedent forecloses URP's efforts to make one legislator's statements during floor debate "evidence" of the

Legislature's intent. What a legislature "ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017). That's why "the views of a single legislator, even a bill's sponsor, are not controlling." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 385 (2012).

c. Count My Vote's website fares no better. This Court has long recognized that "the best evidence of legislative intent" is "[w]hat a legislature says in the text of a statute." *Holland v. Dist. Ct.*, 831 F.2d 940, 943 (10th Cir. 1987) (internal quotation marks omitted). Statements on Count My Vote's website are not statutory text; the Legislature never voted on them and the Governor never signed them.

To be sure, those webpages show Count My Vote's intent. And if those webpages existed in 2014, some (undisclosed and unknowable number of) legislators might have considered those statements when deciding how to vote. But URP cites nothing showing that each of the 70 legislators who voted for SB54 adopted those statements, even in part, as the reason for their "yea" votes. Absent such evidence, Count My Vote's webpages no more establish *the Legislature's* intent than does any other commentary about SB54.

URP's petition casts this record as an evidentiary tsunami. It's actually an evidentiary void. URP cites *no record evidence* showing the Legislature's intent behind SB54.

2. Suppose, however, that non-record historical facts could disclose the Legislature's intent behind SB54—and that the Legislature's intent were relevant to the constitutional question. Even then, the "evidentiary" picture that URP tries to paint is materially incomplete and misleading. As the panel recognizes (Op. 5, 19, 25-26 & n.15), URP ignores other non-record historical facts that change the painting's hues entirely.

URP does not tell the Court that from September 2013 through March 2014, Count My Vote spent more than $1 million to gather signatures from more than 100,000 Utah voters on an initiative that would have eliminated the caucus-convention system as a way for parties to nominate general-election candidates. *See* Op. 25-26 & n.15 (citing sources). If Count My Vote's petition had passed, parties could have nominated candidates only by primary elections. *See id.*

Every Utah legislator in 2014 had acceded to office through a party convention. Those legislators saw that Count My Vote's initiative

had momentum. The caucus system that gave them their positions was on proverbial life support. Not from within—a sort of legislative autoimmune disorder—but from without, because the public demanded change. *See id.*

Rather than allow Count My Vote to outflank it, the Legislature responded by crafting SB54 as a "grand compromise . . . to maintain the URP's traditional caucus system." *Id.* at 19. SB54 passed the Utah House with support from 65 percent of its members (49 yea votes, 20 nay votes, 6 persons not voting) and the Utah Senate with support from 72 percent of its members (21 yea votes, 7 nay votes, and 1 person not voting). *See* S.B. 54 Elections Amendments, Bill Status/Votes, https://le.utah.gov/~2014/bills/static/SB0054.html.

Omitting those non-record facts materially misstates SB54's history. URP asks this Court to believe that Count My Vote had such considerable political clout that supermajorities of both houses passed SB54 in legislative genuflection to it—a group created to eliminate the very system that brought those supermajorities into office. Every interest group should be so fortunate as to have such power, or to

negotiate with legislators as apparently interested in self-immolation as URP paints the Utah's 2014 legislators to have been.

SB54 is not a product of backroom legislative animus toward party conventions. Instead, *SB54 saved the caucus-convention system*. Given Count My Vote's initiative petition, the 2014 Legislature apparently thought that the caucus-convention route to the ballot *would have ceased to exist in Utah* without SB54. So if the Legislature's intent matters, credit the Legislature with intending to *save* the caucus. And legislative intent favoring URP's preferred nomination system hardly justifies rehearing.

C. URP Misrepresents the Panel Opinion's Potential Impact on Other States' Election Laws.

URP seeks rehearing to stave off bad outcomes that "it is not hard to imagine" the panel opinion having in other States. Pet. 16. For example, URP contends that the panel opinion "will likely lead" other States to ditch "existing caucus- or convention-based candidate-selection systems." *Id.* at 15. By URP's count, convention systems "are currently used in most other states in this Circuit—including Colorado, Kansas, and Wyoming—and in thirteen additional states and other jurisdictions nationwide." *Id.* at 15-16. URP's only support for that

assertion is a *Washington Post* infographic about presidential primary-election schedules. *Id.* at 16 n.8.

But that's not what SB54 governs. SB54 sets rules for elections for other federal and statewide offices. *Every State in this Circuit* also requires major political parties to nominate candidates for statewide and federal offices (other than President) by primary election, and allows candidates to qualify for the ballot by nomination petition (or mere application).

- In Colorado, "[a]ll nominations by major political parties for candidates for United States senator, representative in congress, all elective state, district, and county officers, and members of the general assembly shall be made by primary elections." Colo. Rev. Stat. § 1-4-101(3); *see also id.* § 1-4-102 (allowing candidates to qualify for primary ballot "either by certificate of designation by assembly or by petition").
- Kansas makes exceptions for minor parties, but otherwise, "all candidates for national, state, county and township offices shall be nominated by . . . [a] primary election." Kan. Stat. Ann. § 25-202; *see also id.* § 25-205(a) (stating that candidate names "shall be

printed upon the official primary ballot when each shall have qualified to become a candidate by . . . nomination petitions").

- In New Mexico, "[a]ny major political party . . . shall nominate its candidates, other than its presidential candidates, by secret ballot at the next succeeding primary election as prescribed in the Primary Election Law." N.M. Stat. Ann. § 1-8-1(A); *see also id.* § 1-8-21(A) (stating that candidates for statewide office "shall file nominating petitions" with their declaration of candidacy).
- In Oklahoma, "[a] Primary Election shall be held on the last Tuesday in June of each even-numbered year, at which time each political party recognized by the laws of Oklahoma shall nominate its candidates for the offices to be filled at the next succeeding General Election." Okla. Stat. Ann. tit. 26, § 1-102; *see also id.* § 5-112 (stating that "declaration of candidacy must be accompanied by" a "petition supporting a candidate's filing" or a filing fee).
- In Wyoming, "[m]ajor political parties shall participate in the primary election and each shall have a separate party ballot." Wyo. Stat. Ann. § 22-5-202. And Wyoming candidates need not even gather signatures; they file only an application stating that

they are registered members of the party whose nomination they seek and pay a filing fee. *Id.* §§ 22-5-204(b); 22-5-208.

In short, URP's feared stampede of States changing from conventions to primaries already happened in this Circuit. Rehearing thus will not protect the status quo. It will threaten it—undermining, in an election year, the nomination system in *every* Tenth Circuit State. *Cf. Clingman*, 544 U.S. at 599 (O'Connor, J., concurring in part and concurring in the judgment) ("Nearly every State in the Nation now mandates that political parties select their candidates for national or statewide office by means of primary elections.").

II. Neither Question in URP's Petition Merits Rehearing.

URP also asks the Court to rehear this case to consider two questions. *See* Pet. iii. Neither question merits rehearing.

A. URP's first question proceeds from the premise that URP has mountains of "evidence that [SB54's primary-election] requirement was designed to affect the types of candidates selected and, with them, the party's message." Pet iii.

By framing this question in the passive voice, URP skirts the critical question of *who* allegedly designed SB54 that way.

The Utah Legislature is the only actor whose purported intent might be relevant to URP's First Amendment association claim. And as explained, *supra* at 12-16, URP cites no record evidence showing that the Legislature intended SB54 to change URP's message or candidates. Instead, as the panel recognized (Op. 5, 19), the Legislature passed SB54 to save the caucus-convention system from Count My Vote's initiative, which would have destroyed that route to the ballot—and which the Legislature apparently believed had enough public support to pass. *See* Op. 25-26 & n.15 (citing sources).

If the Court wants to decide whether a law requiring political parties to nominate candidates by primary election violates the First Amendment *because the enacting legislature wanted to change a party's message*, this case provides no such chance. No evidence of that intent exists here. And since "[c]ourts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances," *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937), an en banc opinion answering that question would be ripe for Supreme Court review.

B. The premise of URP's second proposed question, in turn, is that the panel majority "disregard[ed]" SB54's "impact on the association

itself, as determined by its duly constituted leadership, by examining instead the law's impact on the association's rank-and-file members." Pet. iii. But this premise is also false; it results from URP's misreading the opinion.

URP objects to a part of the opinion (at 19-23) answering a fundamentally different question than the one URP now poses. The majority answers URP's argument that SB54 "leaves the party vulnerable to being saddled with a nominee with whom it does not agree." Op. 19. In rejecting that argument, the panel's analysis focused specifically on "this context, in which *the question is whether the party is being forced to associate with individuals with whom it may not agree*." *Id.* at 20 n.8 (emphasis added). Since the district court had previously invalidated SB54's Unaffiliated Voter Provision, the answer to that question was "no," because every URP general-election candidate now "enjoy[s] the support of at least a plurality of the voting members of" URP. *Id.* at 21. In other words, the Republican Party's association rights are not affected when only Republicans participate in selecting a Republican nominee for the general election—even when that nominee

"might reflect a different choice than would be made by the party leadership." *Id.* at 22.

This reasoning cannot be read, as URP now suggests, to hold that party leadership lacks the ability "to speak for the organization, regardless of the views of its members." Pet. 19. Of course party leaders still can do that—even on the matter of how the party prefers to nominate its candidates. *See id.* at 20 (citing *Eu*, 489 U.S. at 230). That's why the panel opinion does not implicate *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), or Judge Hartz's separate opinion in *Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1149 (10th Cir. 2013) (en banc); the panel never disputed that URP's leadership can (and does) "take[] an official position" about the party's preferred way to nominate candidates, 530 U.S. at 655.

Party leadership also can endorse candidates, or spend party money supporting leadership's chosen candidate, or campaign against any nominee they dislike. The panel opinion recognizes as much. *See* Op. 22 & n.11. Neither SB54 nor the panel opinion tries to stop URP's leaders from speaking, endorsing, or campaigning. SB54 stops the party

only from nominating candidates solely through convention—as *Lopez Torres*, *Jones*, and *White* contemplate.

URP last contends that the panel opinion "opens the door to greater government regulation of other expressive associations" such as "the local rotary club" or "the church." Pet. 23. But URP's petition is internally inconsistent: Fourteen pages earlier, URP recognizes that "[t]he majority apparently agrees that Utah's legislature could not do to the Sierra Club or Catholic Church what it has done to the Party." *Id.* at 9 (citing Op. 16 n.6).

The opinion and URP's characterization of it align, so there is no risk in taking the opinion at its limiting word—"[t]he state has no interest . . . in the process by which [a church's] priest is chosen." Op. 16 n.6. The opinion thus follows the distinction in the Supreme Court's cases "recogniz[ing] that the state's ability to regulate the association is not the same" for political parties who designate their candidates on a ballot "as it is" for other expressive associations. *Id.*; *see supra* at 10-12 (discussing the distinction between the rules governing regulation of the party's external activities and the party's internal affairs, a distinction the panel followed).

CONCLUSION

This Court should deny URP's petition for rehearing or rehearing en banc.

Respectfully submitted.

DATED: May 15, 2018

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A).

1. This brief complies with the Court's April 24, 2018, Order setting the word limit for this brief at 4,900 words, because it contains 4,850 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f) and 35(b).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14 point font (footnotes in 13 point font).

Dated this 15th day of May, 2018.

/s/ Tyler R. Green

ECF CERTIFICATIONS

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies that:

1. all required privacy redactions have been made;

2. any hard copies of the foregoing required to be submitted to the clerk's office are exact copies of the brief as filed via ECF; and

3. the response filed via ECF was scanned for viruses with the most recent version of Microsoft Security Essentials v. 2.1.111.6.0, and according to the program is free of viruses.

/s/ Tyler R. Green

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2018, a true, correct and complete copy of the foregoing Brief in Opposition to Petition for Rehearing or Rehearing En Banc was filed with the Court and served on the counsel of record via the Court's ECF system.

/s/ Tyler R. Green