No. 18-450

In the
Supreme Court of the United States

UTAH REPUBLICAN PARTY,
Petitioner,

v.

SPENCER J. COX, et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, AND FREEDOM PARTNERS CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF), the Cato Institute, and Freedom Partners Chamber of Commerce file this amicus curiae brief in support of Petitioner Utah Republican Party. PLF was founded in 1973 to advance the principles of individual rights and limited government. PLF has long defended the freedoms of speech and association, including most recently before this Court in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies works to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual Cato Supreme Court Review.

Freedom Partners Chamber of Commerce is a non-partisan organization whose members support

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[1] Pursuant to this Court's Rule 37.2(a), PLF has received written consent from all parties to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

free enterprise, fiscal responsibility, and fair markets. Freedom Partners' vision of a free and open society includes important policy issues such as creating opportunity for all, eliminating corporate welfare, safeguarding our financial future, protecting free speech, and keeping Americans safe, are at the forefront of the public debate. Amicus believes that the Utah law undermines basic associational freedoms that are necessary to such a free and open society.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Political parties have long played an important role in unifying, organizing, petitioning, and enacting meaningful political change. Individuals engage in these associations to exercise their First Amendment freedoms to speak, assemble, petition, and seek redress of grievances. Yet political parties often are treated as the black sheep of the associative organizational family. *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000), acknowledged the central importance of political parties in American governance. But despite the Court's strong pro-association ruling in *Jones*, dicta in that and other cases suggest that states can interfere with the internal affairs of a political party and control how the party selects its nominee for political office. Utah has done just this by enacting a law that details the limited methods by which political parties may select their nominees. Pet. App. 2a (citing the Utah Elections Amendments Act of 2014, commonly known as SB54 (codified at Utah Code 20A-9-101)). When the Utah Republican Party

sued to invalidate the law, the Tenth Circuit upheld it as a "reasonable, common-sense regulation[] designed to provide order and legitimacy to the electoral process." Pet. App. 50a.

The Tenth Circuit held that, because the compelled primary procedure allows a majority of party members to select the nominee, the rule does not interfere with the Utah Republican Party's freedom of association. *Id*. But political parties are more than just the sum total of their membership. Party leadership plays an indispensable role in the recruitment and selection of ideologically consistent candidates—usually without the affirmative participation or consent of the majority of its members. The First Amendment should protect political parties' unique procedures to vet and select their preferred candidates.

REASONS TO GRANT THE PETITION

I

THIS COURT SHOULD TAKE THIS CASE TO RESOLVE THE TENSION BETWEEN POLITICAL PARTY AUTONOMY AND STATE CONTROL OF ELECTIONS

To what degree may states, exercising their regulatory power over the time, place, and manner of elections, U.S. Const. art. I, § 4, cl. 1, interfere with internal political party decisionmaking? Although political parties are not mentioned in the Constitution, they have been a vibrant and integral part of the election process in this nation from the time of the founding. Alexis de Tocqueville, reflecting

on his travels throughout America, acknowledged that the unprecedented diversity and vibrancy of "political associations" contributed immeasurably to the American social fabric: "There is only one country on the face of the earth where the citizens enjoy unlimited freedom of association for political purposes." Alexis de Tocqueville, 2 *Democracy in America*, second book, ch. VII at 123 (Phillips Bradley, ed., Vintage Books 1945) (1840). As de Tocqueville recognized, political associations have always served as "large free schools" where "Americans of all conditions, minds, and ages, daily acquire a general taste for association, and grow accustomed to the use of it." *Id.* at 125, 127. *See also* L. Sandy Maisel, *American Political Parties: Still Central to a Functioning Democracy?*, American Political Parties: Decline or Resurgence 108–09 (CQ Press ed., 2001) (political parties created social networks and encouraged civic participation). De Tocqueville recognized another vital truth: Because political associations "aspire to rule the state," those in power look upon political parties with an "instinctive abhorrence" and stand ready to "combat them on all occasions." de Tocqueville, *supra*, at 126.

The First Amendment stands as a bulwark against the natural tendency of the state to co-opt political parties for its own purposes. Historically, most courts hesitated to enforce constitutional limitations on state regulations of political parties, giving "states . . . near plenary authority to regulate political parties." Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 Colum. L. Rev. 775, 780 (2000). Parties were seen as little

more than "the state's tool for channeling political participation." *Id.* This treatment "stifle[d] competition" and impoverished political discourse. *Id.* at 781. Laws limiting the party's financial and organizational role in the nominating process "stripp[ed] political meetings of most of their functions." Stephen E. Gottlieb, *Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case*, 11 Hofstra L. Rev. 191, 191 (1982); *see also* Maisel, *supra*, at 108–09 (arguing that "party leaders today are often unable to perform what should be their most vital function in our democracy, the recruitment of candidates for office"). By the early-to-mid 20th century, states had largely "capitulated to turn-of-the-century populists' efforts to purify the electoral process" and had "wrest[ed] control over the party decisionmaking processes from the party organization." Persily & Cain, *supra*, at 190–200; *but see Stephenson v. Boards of Election Comm'rs for Ctys. of Alger, Baraga, etc.*, 118 Mich. 396, 405–06 (1898) (the right of political parties to govern their own affairs was protected by an understanding that "[p]olitical parties are voluntary associations for political purposes" and attempting to regulate or compel the internal decisionmaking of parties "would be alike dangerous to the freedom of elections [and] the liberty of voters").

This Court later recognized the importance of free association and political parties in securing the promises of a republican form of government. *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 616 (1996) ("The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or

other political committees."). *Colorado Republican* followed decisions that emphasized the voluntary associational nature of political parties. *See O'Brien v. Brown*, 409 U.S. 1, 4 (1972) (because "intra-party disputes" were best left to parties themselves, state laws that interfered with that internal deliberative process were unconstitutional); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981) (because freedom of association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only," any law that required the "inclusion of persons unaffiliated with a political party may seriously distort its collective decisions" and is presumptively unconstitutional).

Governmental overreach impelled the Court to carefully scrutinize state regulations governing the primary process and candidate selection. In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 215 (1986), the Court invalidated a state law that allowed only party members to participate in the party primary, excluding unaffiliated voters, as a clear infringement "upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals." Then, in *Jones*, the Court invalidated a California law *requiring* open primaries where unaffiliated voters could determine the party's nominee because the processes by which political parties select their nominees are not "wholly public affairs that States may regulate freely." 530 U.S. at 572–73. "In no area is the political association's right to exclude more important than in the process of selecting its nominee." *Id.* at 575. The state's goals of "enhanc[ing] the democratic nature of the election

process and the representativeness of elected officials" by "weaken[ing] party hard-liners" and allowing for the election of "moderate problem-solvers" could not override First Amendment rights. *Id.* at 570–71 (quotation marks omitted). The common thread through both *Tashjian* and *Jones* is that the internal process for determining a party nominee is the protected domain of the party in which the state may not tread either by forbidding or compelling association, because the process affects the identity of the successful competitors.

Political party First Amendment claims have been rejected in some circumstances, though, when state laws reflect government's role in structuring and monitoring the election process, including primaries. For example, to "assure that intraparty competition is resolved in a democratic fashion," a state may require that intraparty competition precede a general election so that each political party has a single candidate for each office on the ballot, or require parties to demonstrate "a significant modicum of support" before allowing their candidates a place on that ballot, or require party registration a reasonable period of time before a primary election. *Jones*, 530 U.S. at 572 (citing *Am. Party of Texas v. White*, 415 U.S. 767, 781 (1974); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Rosario v. Rockefeller*, 410 U.S. 752 (1973)).

The tension continued in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 447 (2008), which considered a facial challenge to a Washington law allowing candidates to designate their party preference on the primary and general election ballots and providing no mechanism for a party to "prevent a candidate who is

unaffiliated with, or even repugnant to, the party from designating it as his party of preference." The Court rejected the argument that the law facially violated the party's freedom of association rights because it was speculative as to whether the law (which had not yet been implemented) would actually cause voter confusion. *Id.* at 454–55. Chief Justice Roberts and Justice Alito concurred with a warning to the state that the ballots, when printed, must describe the party preference in such a way as to avoid implying that the party chose the candidate, instead of the other way around. *Id.* at 460–61 (Roberts, C.J., concurring). Justices Scalia and Kennedy dissented, arguing that no matter how the printed ballot looked, voters would reasonably believe that "the organization is understood to embrace, or at the very least tolerate, the views of the persons linked with them," a violation of the party's First Amendment associational rights. *Id.* at 463 (Scalia, J., dissenting). Political parties as institutions have associational rights that cannot be subservient to the state's interest in greater political participation, or nudging voters to alter the identity of the participants.

The multiple opinions in *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008), exemplify the tensions between state regulation of elections and political party associational interests in determining their members and their candidates. In *Lopez Torres*, a disappointed would-be judicial candidate challenged a state law requiring that political parties select their nominees for Supreme Court Justice at a convention of delegates chosen by party members in a primary election. *Id.* at 198. The Court rejected Lopez Torres's challenge unanimously

because individual candidates cannot "rely on the right that the First Amendment confers on political parties to structure their internal party processes and to select the candidate of the party's choosing." *Id.* at 203.

At first glance, *Lopez Torres* seems relatively uncontroversial because it raised associational rights only "as a shield and not as a sword" and so the interests of the state and the political party were aligned. *Id.* But by offering language to support both a robust protection of political association and a broad understanding of a state's power, *Lopez Torres* offered something for everyone but clarity for no one. On one hand, *Lopez Torres* stands for the principle that states, to "ensur[e] the fairness of the party's nominating process," can mandate party processes that allow party leaders, as a practical matter, to hold the power of conferring candidacies. *Id.* at 203, 205. Under this reading, *Lopez Torres* is primarily a case about deferring to state-created election formats even though they may make it easier or harder for certain candidates to be elected.

On the other hand, *Lopez Torres* was also a freedom of association case which underscored a "political party['s] . . . 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." *Id.* at 202–03. Under this reading, *Lopez Torres* is first and foremost a decision protecting the primacy of political parties in the election process. The primary process need not follow the most democratic and open process imaginable so long as it allows party membership a degree of participation.

These alternative approaches split the panel in the court below. The majority opinion focused on the state's role in enacting "reasonable, nondiscriminatory electoral regulations." Pet. App. 11a, 13a, 26a. The Court concluded that Utah had a "manifest interest" in "ensuring that the governed have an effective voice in the process of deciding who will govern them." Pet. App. 14a, 30a. The majority opinion thus is rooted in *White*'s view that the state must manage the private association rights of political parties to ensure that they are sufficiently democratic and accountable.

Chief Judge Tymkovich's concurring and dissenting opinion, on the other hand, echoes the pro-associative freedom reasoning of *Jones*. He emphasized that Utah's efforts to change the election procedure were intended to change the substantive outcome of the internal deliberative process of Utah political parties. Pet. App. 51a (Tymkovich, C.J., concurring in part and dissenting in part). The Utah Republican Party had chosen its party convention nomination system for a variety of substantive reasons, including a desire to "make certain that nominees are committed to the Party's platform," and to ensure that its nominees "will have obtained a majority (and not just a plurality) of party members' votes." Pet. App. 54a. Utah's law was designed to undercut those objectives by changing the "communitarian" nature of the caucus, Pet. App. 65a, and forcing "moderate problem-solvers" upon the party. *See Jones*, 530 U.S. at 570. Judge Tymkovich emphasized that the law "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." Pet. App. 69a (footnote omitted).

Both the Tenth Circuit opinions could rely on this Court's case law because of the fault line between party autonomy and state control that this Court has never fully reconciled. Such contradictory rationales and standards are unacceptable when the stakes are as high as the freedom of political associations and the stability of our republican form of government.

II

THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR CLARIFYING GROUPS' ASSOCIATIONAL RIGHTS

This Court should also grant certiorari to address the unsettled status of group rights under the First Amendment. The Tenth Circuit below held that SB54 did not impose a substantial burden on the party's associational rights because individual party members could still reject the candidate thrust upon the party by the state-mandated process in the primary. Pet. App. 22a-23a. But if regulation designed to alter group identity can escape scrutiny simply because the regulation aims at a group's superstructure rather than individual members, then many values of civil society will go unprotected. This Court should clear up a murky area of constitutional jurisprudence: the nature of group rights and the relationship between group rights and individual rights.

A. Does the Freedom of Association Apply Equally to Individuals Acting Alone and Individuals Collaborating as a Group?

There is no question that groups have First Amendment rights. *Boy Scouts of America v. Dale*, 530 U.S. 640, 647 (2000) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("[i]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.")). There is a related question, however, that this Court should resolve in this case: whether a group's associational rights are co-extensive with the rights of its individual members. In other words, can individual members' rights serve as proxies for the rights of the group, or does the group enjoy rights distinct from its individual members' interests? This is not a purely academic question. Indeed, the answer may be dispositive in this and other important constitutional cases.

In *NAACP v. Alabama*, 357 U.S. 449 (1958), the Court "implicitly bifurcated associational rights into their individual and collective components." *Republican Party of the State of Connecticut v. Tashjian*, 770 F.2d 265, 277 (2d Cir. 1985), *aff'd* 479 U.S. 208 (1986). The individual component "focuses on the effect of a government action on the individual's right to association with other individuals as a medium for self-expression; the collective component focuses on the rights of the organization qua association, and the effect a government action has on the organization's character." *Salvation Army v. Dept. of Comm. Affairs*

of State of N.J., 919 F.2d 183, 197–98 (3d Cir. 1990). *See also Urbino v. Orkin Services of Cal., Inc.*, 726 F.3d 1118, 1122 (9th Cir. 2013) (to determine amount in controversy for diversity jurisdiction, court must ascertain whether claims are individual united in a common and undivided interest or whether they are held in "group status").

This Court has implied that group-specific rights exist, but has yet to make an explicit pronouncement on this point. *See* Frederick M. Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 Utah L. Rev. 47, 47 (2010) ("[E]very time some unguarded Supreme Court language has hinted at group rights, academics have responded that the Court should confirm such rights in doctrine. But the Court never has."). This is an important issue, given the vital role that voluntary associations play in American society, a role that is imperiled if associations themselves lack distinct rights. This Court's decisions ensuring that individuals within a group retain their rights to associate, while essential, do not always suffice to protect the group associational rights.

B. Constitutional Protection of Groups' Associational Rights Is a Matter of Nationwide Importance

Civil society, built upon private associations, strengthens liberal democracy. *See* Robert Putnam, *Bowling Alone: America's Declining Social Capital*, Journal of Democracy 65, 65 (1995) ("American social scientists…have unearthed a wide range of empirical evidence that the quality of public life and the performance of social institutions . . .are indeed

powerfully influenced by norms and networks of civic engagement."). As this Court has held, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 460. Groups can likewise facilitate and safeguard the "ability independently to define one's identity that is central to any concept of liberty." *Jaycees*, 468 U.S. at 619.

The United States has cultivated a potent civil society in part because our constitutional order encourages diverse associations to arise as competing purveyors of norms and social obligations. Franklin G. Snyder, *Sharing Sovereignty: Non-State Associations and the Limits of State Power*, 54 Am. U. L. Rev. 365, 366 (2004) (discussing "the important role of non-State associations in providing competition to the State in education and formation of meaning"). Indeed, the dispersal of power among private groups serves as a "counterweight . . . to the State's impulse to hegemony." *Id. See also Wisconsin v. Yoder*, 406 U.S. 205, 226 (1972) ("Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage."). Dissent is far more feasible when individuals can stand together in common cause. *NAACP*, 357 U.S. at 460. Thus, the government, as a competitor to voluntary associations within its jurisdiction, should not enjoy broad power to regulate and control them. Snyder, *supra*, at 367. *See also Boy Scouts of America*, 530 U.S. at 647–48 ("This [associational] right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.").

A tolerant attitude toward associations means that even groups that conflict with a state's liberal values are entitled to constitutional protection. *See, e.g.*, *Nat'l Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (Nazi group entitled to march in town with large Jewish population.); *Snyder v. Phelps*, 562 U.S. 443 (2011) (religious group entitled to stage a protest at the funeral of a military service member).[2] While some narrow limitations on groups may be permitted to further compelling governmental interests such as eradicating race discrimination, *see, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (denying tax-exempt status to a university because of a racially discriminatory admissions policy), it is dangerous—and unconstitutional—for states to impose regulations that guide or constrain how a group defines itself, rather than addressing illiberal outcomes when they arise. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston,* 515 U.S. 557, 575 (1995) (emphasizing that the choice to exclude individuals and viewpoints for expressive reasons "is presumed to lie beyond the government's power to control").

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[2] While Nazis and Westboro Baptists are widely denounced, the Constitution protects even those groups with whom decent people would generally choose *not* to associate. This protects that larger principle that voluntary groups cannot flourish if the state treats them, in the words of Thomas Hobbes, as "lesser commonwealths in the bowels of a greater, like worms in the entrails of a natural man." Thomas Hobbes, *Leviathan* 218 (M. Oakeshott ed., Basil Blackwell 1946) (1651).

C. Groups Have Unique Interests Beyond Those of Their Members

There is an intuitive appeal to the notion that a group derives its rights from its individual members.[3] That notion, however, does not suffice to always answer the constitutional questions that arise in the group context. After all, groups have features that individuals do not—bylaws, hierarchy, membership requirements, decisionmaking procedures, and so on. When a constitutional question relates to a feature unique to the group context, a proxy analysis that compares the groups' rights to the rights of individual members may not offer the group adequate protection. *See* Pet. App. 73a ("A political party is more than the sum of its members . . . . The superstructure of the party—its bylaws, customs, and leadership—are protected by the First Amendment too.") (Tymkovich, C.J., concurring in part and dissenting in part).

This Court has implied the existence of group rights that are not simply derivatives of individual rights, often in the context of the religion clauses. The ministerial exception allowing for church autonomy in the selection of clergy is one example. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 190 (2012).

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[3] This is the principle underlying associational standing in federal courts. An organization may sue to redress its members' injuries when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

Likewise, courts recognize that "matters of Church government" such as ecclesiastical rules, bylaws, and doctrines enjoy wide latitude under the religion clauses. *See Watson v. Jones*, 80 U.S. 679, 727 (1872) ("[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them."). Such case law cannot be explained simply by reference to the right of the individual—church autonomy cases involve rights related to group characteristics that have no useful analogy to the rights of the individual members.

This solicitude toward distinct group rights in the religion context has extended beyond questions of leadership structure. In *Wisconsin v. Yoder*, the Court held that an Amish community's commitment to education within the community could overcome the state's interest in a full high school education. *Yoder*, 406 U.S. at 234–35. In holding that Wisconsin could not criminally prosecute Amish parents for removing their children from the last two years of high school, the Court repeatedly emphasized the rights of the "social unit," not just the interests of the parents or the children. *Id.* at 212, 222. The holding therefore hung on the group's distinct rights, separate from the rights of the individual children being educated.

While the religion clauses of the First Amendment provide a different and sometimes enhanced form of protection, *Yoder*, 406 U.S. at 216, group rights distinct from those held by the individual should not be reserved solely to the religious context. Beyond the religion clauses, this

Court has occasionally issued decisions in other First Amendment contexts that are similarly supportive of distinctive group rights. For example, in *Boy Scouts of America*, the Court held that the Boys Scouts had an associational right to deny homosexuals membership in the organization. 530 U.S. at 656. The Boy Scouts organization could invoke this right even if individual members did not share the organization's view. *Id.* The group, as distinct from the individual, had a right of association with regard to group membership requirements. *See also N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 18 (1988) (O'Connor J., concurring) (emphasizing that this Court's opinions "recognize an association's First Amendment right to control its membership" (internal quotation marks omitted)). Expanding the sphere of the associational rights of groups is also consistent with this Court's vigorous efforts to expand constitutional protections to other collaborative groups such as corporations. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) ("Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster".) (quotation marks and citations omitted); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014) (closely held corporation could argue that a regulation burdened its "exercise of religion").

To the extent that this Court has dealt with the group rights of political associations, it has hinted that groups enjoy the constitutional right of association. For instance, in *Lopez Torres*, discussed *supra* at 8–9, the Court emphasized that an

individual party member was "in no position to rely on the right that the First Amendment confers *on political parties* to structure their internal party processes and to select the candidate of the party's choosing." 552 U.S. at 203 (emphasis added). But while an individual lacks that position, the political parties themselves do have the ability to invoke the First Amendment to protect their internal workings. Yet decisions like *Lopez Torres* are rife with internal tension, and the Tenth Circuit's decision below shows that this constitutional issue deserves clear guidance from this Court.

D. SB54 Uniquely Impacts the Group's Associational Rights

This case presents an excellent vehicle for addressing the issue of group rights because SB54 does not equally burden both group and individual interests. Under SB54, political parties that wish to select candidates via caucus and nominating convention must also allow candidates to qualify for a primary through signature-gathering. Pet. App. 2a–3a. The Tenth Circuit recognized that SB54 affects how the *group* selects nominees, but it held that associational rights were preserved because a plurality of *individuals* within the group can either reject or accept the candidate during the primary. *See* Pet. App. 21a–22a (holding that the Republican Party is not "in danger of fielding a general election candidate who does not enjoy the support of at least a plurality of the voting members of the Utah Republican Party.") (footnote omitted). Key to this holding was the Tenth Circuit's explicit conflation of the group's interests with the interests of its

constituent members: "[O]ur task today is to analyze SB54's burdens on the Utah Republican Party, or . . . 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." Pet. App. 21a. Yet the group and its individual members do not enjoy identical constitutional interests, and the preservation of the *individuals*' associational interests does not necessarily entail preservation of the *groups'* associational interests.

In some sense, the Tenth Circuit revived a version of the Ninth Circuit's discredited approach in *Jones*. The Ninth Circuit held in *Jones* that the blanket primary imposed a negligible burden because the parties could still endorse the primary candidate they preferred. *California Democratic Party v. Jones*, 169 F.3d 646, 659 (9th Cir. 1999). This Court rejected that reasoning: "The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee." *Jones*, 530 U.S. at 580. While the Ninth Circuit believed the burden was minor because group rights of association were preserved, the Tenth Circuit now believes the burden of SB54 is minor because individual members' association rights are preserved. But the ability of individual members to vote in the primary is "simply no substitute" for the party's right to determine whether to hold a primary or select which nominees run in it. *Id.* Both the group rights and the individual members' rights must be

respected—neither is an adequate proxy for the other.[4]

Allowing the Tenth Circuit's conflation of group and individual interests—with individual interests often serving as proxy for the group—threatens individual liberty. A group's decisionmaking procedures, which often lack a close analogy to individual member rights, help define the group's identity and purpose. As with the constitutional system of separated powers, procedure affects substance. Likewise, manipulation of decisionmaking structures also affects the resulting substantive decisions. *Cf. Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (Every procedural variation can be "outcome-determinative."). Hence, the power to alter group superstructure is the power to alter the group's identity, message, and purpose. *See Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 231, n. 21 (1989) ("[R]egulating the identity of the parties' leaders . . . may also color the parties' message and interfere with the parties' decisions as

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[4] This is not to say that group interests supersede the interests of the group's individual members. Rather, legislation must honor the constitutional interests of both the group and its members. Where such interests conflict, reasonable regulation might play a role. For instance, individual members' rights may be imperiled if they are forced into the association or lack the power to exit. *See, e.g.*, *Janus v. Am. Fed'n of State, Cty., and Mun. Emps.*, 138 S. Ct. 2448, 2486 (2018) ("Neither an agency fee nor any other payment to the union may be deducted from nonmembers' wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay."); *Citizens United*, 558 U.S. at 361–62 (holding that speech restrictions on corporations could not be justified on the basis of protecting dissenting shareholders because shareholders can divest).

to the best means to promote that message."). This dampens the ability of groups to offer avenues for individuals as they seek meaning, identity, and value.

Indeed, this very case exemplifies that principle. SB54 was designed to alter the substance of the Utah Republican Party's message and identity through compelled changes to its superstructure. SB54's proponents intended the compelled nomination procedure to result in more "moderate" candidates, thereby limiting the scope of ideological diversity among the regulated groups. *See* Pet. App. 95a (Tymkovich, C.J., concurring in part and dissenting in part). This danger is especially profound with political parties, given their proximity to the political process and the state's corresponding interest in monitoring and controlling them. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (broad definition of core political speech entitled to full First Amendment protection). Hence, if groups have no rights distinct from their individual members, then the state can enjoy substantial power to manipulate them, especially those that operate as competitors or dissenters.

CONCLUSION

This case is the right vehicle to address the unsettled and important issue of whether the interests of individual members serve as adequate proxy for a group's associational rights, or whether those groups have associational rights distinct from those of individual members that require a separate analysis. The petition for writ of certiorari should be granted.

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Respectfully submitted,

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