Nos. 16-4091, 16-4098

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UTAH REPUBLICAN PARTY,

Plaintiffs-Appellant,

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. 16-cv-00038, the Honorable David Nuffer

BRIEF OF INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING OR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

CORPORATE DISCLOSURE STATEMENT

Counsel for *amicus curiae* certifies that the Institute for Free Speech is a nonprofit corporation, has no parent companies, subsidiaries, or affiliates and that no publicly held company owns more than 10 percent of its stock.

INTEREST OF *AMICUS CURIAE*

The Institute for Free Speech is a nonpartisan, nonprofit organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government through strategic litigation, communication, activism, training, research, and education. The Institute is the nation's largest organization dedicated solely to protecting First Amendment political liberties.

Amicus confirms that no party's counsel authored this brief in whole or in part, and that no person contributed funds intended for the preparation or submission of this brief. All parties have consented to the filing of this brief.

ARGUMENT

"Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The Constitution's protections for association reach further than the speech (or candidate endorsement) that a majority or plurality of group members would personally make if each could instantaneously cast a secret ballot. Nor is protected association merely a mechanical averaging of the members' views. It is something altogether different that both results from, and acts upon, the history of the members' association with each other.

That is why the First Amendment protects not just speech itself, but also the "the right of the people peaceably to assemble," including the right of expressive associations to live by their own rules when deciding what and how to speak in the public square. The majority opinion was therefore wrong when it held that in assessing whether a regulation imposes a severe burden on a group's associational rights, courts should "pierce the veil" by disregarding the burdens imposed upon a group's representatives and internal governance. The opinion would replace the organization's asserted interests and burdens with the court's own judicially-imagined assumptions about what decisions a majority of the group's members, individually canvassed, might "really" prefer—and, therefore, what sorts of state intrusion this bundle of individuals might perceive as burdening those preferences.

Maj. 19–24. Arbitrary judicial re-imagining of a plaintiff group's asserted interests and constitutional grievances will directly harm the autonomy and expression of groups beyond the political party at issue here. Consequently, this Court should grant rehearing or rehearing *en banc*.

I. This case presents a question of exceptional importance to all expressive associations, including political parties, civic groups, labor unions, and religious organizations

A. The Court declined to consider any burden a state law poses to the internal government of an association

This appeal concerns the Utah Republican Party's (the "Party's") assertion that a state law violates the Party's right of expressive association. The majority reviewed the Party's First Amendment challenge to the constitutionality of the state law under the *Anderson-Burdick* framework. Under *Anderson-Burdick*, a court must classify "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate," *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citation omitted), as either "severe" or not. The majority recognized that, "[i]f a regulation is found to impose 'severe burdens' on a party's associational rights, the regulation must be 'narrowly tailored to serve a compelling state interest.' " Maj. 13 (quoting *Clingman v. Beaver*, 544 U.S. 581, 586 (2005)) (citation omitted).

The majority, over Chief Judge Tymkovitch's dissent, concluded the new state law does not impose a severe burden on the Party under the *Anderson-Burdick* framework. *Id.* 24. The majority opinion limited the Party's associational rights in a novel and important way: it characterized the "burden" under *Anderson-Burdick* as consisting *only* of any conflict between the law and the average of the presumed preferences of each individual party member. *Id.* 20 & n.8. Under this model, the Party and other associations exist only as an unstable bundle of individual speech preferences—not as an entity capable of using its own leaders, organization, rules, and tradition to devise and sustain a collective position. Any burden on the Party expressing itself as an entity, the majority said, fell "just [on] the leadership of the party." *Id.* The majority distinguished between the burden on individual party members and a presumed "party leadership," despite the fact that Utah Republicans elect, and choose to associate with, "the roughly 3,500 party delegates that comprise the URP's caucus electorate." *Id.* 20–21. The Party's delegate-to-member ratio is better than one in two hundred; the Party is far more democratic than most groups, including governmental entities. Caucus delegates cannot all be characterized as executives or "party bosses." *Id.* 17, 23.

It is the majority's apparent view, then, that an association's position is not one arrived at by the procedures actually adopted by the membership. Instead, an association's position can only be adopted by an internal plebiscite. That logic

reads out the very qualities that make the Party—and any other formally-constituted association—a stable, effective institution, rather than a shifting amalgam of individual, atomized preferences.

B. The internal workings, rules, and constitution of an association are essential components of that association's liberty

The majority opinion sends a dangerous invitation to states to adopt highly intrusive regulations of the bylaws, leadership selection, and other internal decision-making procedures of expressive associations. If such action is challenged as unconstitutionally intrusive, state defendants could, under the logic of this decision, ask courts to "pierce the veil" of plaintiff associations to speculate about whether a majority of association members, if they were canvassed, would truly find themselves burdened. If the answer is "no"—which it may well be where the state intrusion would rearrange internal governance in a purportedly more democratic way—an association's challenge may fail at the burden stage, before the state ever has to seriously defend its interest in reshaping the organization. Courts would simply hold that the association's asserted interest—and the concomitant burden—was actually just the frustration of the desires of a narrow leadership class that had lost touch with the broader membership. Such flawed analysis would bless state intrusion into a disfavored association the instant a court could imagine that a majority of members might disagree with the association's asserted interests and burdens.

Under this analysis, truly strict scrutiny would become an anachronism, as states would never have to assert and prove the permissibility of their interests in regulation or the narrowness of their tailoring. They would effectively be able to claim that a like-minded majority within the organization itself probably agreed with the state's intrusion and therefore experienced no burden, crippling the plaintiff organization's claim at the burden stage. In case after case, such reasoning could allow broad-based intrusion into the means by which expressive associations govern themselves. And not infrequently, such intrusive governance changes become "simply a means to control content." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

Fortunately, the *Anderson-Burdick* framework and its doctrinal cousins currently require more. Courts consider the burden state regulation imposes on an expressive association *itself*—not based on a court's presumption regarding the preferences of each individual member were they to be instantaneously canvassed. Not only is the latter measure of "burden" judicially unworkable, it misconceives expressive association as only the mechanical sum—or perhaps the mean—of thousands of individuals' speech preferences.

Even on these facts, the majority's members-only focus provides an unworkable standard. As the majority implicitly recognized, the new state primary process could, in fact, nominate the candidate that only a minority of Party

members prefer. In a multi-candidate primary, only a plurality of members is needed to elect a nominee. A majority of members who split their votes amongst other nominees may, in fact, prefer a different candidate in a two-candidate race. Forced association with an undesired candidate provides the epitome of a severe burden on the right to expressive association.

The majority's opinion also overlooks the nature of organizational governance. Expressive associations, including churches, labor unions, industry associations, and advocacy groups, often adopt management structures to effectuate their purposes. These groups, like our own government, recognize that majority-rule direct democracy has limits and may not best effectuate every group's goals. Suppose that a group's membership, while agreeing on numerous issues, was sharply divided on a particular piece of legislation. The tally of members for or against the legislation might change, back and forth, over short periods of time as only a few members join or leave the group—or are persuaded by one another's arguments. An instantaneous poll of members present at any one meeting would indicate little about the true preferences of all members.

Groups adopt internal governance procedures, then, both to promote the group's effectiveness and as an exercise, in itself, of associational liberty. Group members entrust management of the group to dedicated representatives, recognizing that management's views may differ from the changing views of the

group's rank-and-file. Organizations also protect their associative rights by requiring supermajority votes to approve certain changes to the group's mission. A court cannot simply assume that an expressive association's governance structure fails to serve its members' interests. *Cf. Citizens United*, 558 U.S. at 361–62 ("There is, furthermore, little evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy.") (citation and internal quotation marks omitted). The majority's opinion threatens to undermine the hard-fought constitutional right of expressive association by reducing every voluntary association of citizens to a mob of individual preferences without any right to structure true, enduring institutions.

C. Piercing the veil in this fashion, if permitted, has broad consequences both for associational liberty and for speech

The majority's wholesale denial that a group possesses any associational rights, apart from members' individual interests, threatens all associational liberty and will undoubtedly burden certain viewpoints. For example, the majority's analysis might well permit the state to condition the benefits of expressive association on proof that a majority of members agree with a particular position. A city might condition the anonymity of a group's members on proof that a majority of the members actually wish to remain anonymous. *Cf. Bates v. Little Rock*, 361 U.S. 516 (1960) (holding municipal ordinance seeking disclosure of NAACP membership and contributor list violated associational rights). Similarly, a state

might condition the right to exclude certain members from the group on proof that a majority of members wish to exclude a particular person or class of persons. *Cf. Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

Finally, changing the class of persons with permissible associational interests invariably affects the viewpoints expressed through political speech. The right to expressive association "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Id.* at 647–48 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). Speech flows from and is enhanced by the right to expressive association. Limiting the class of persons who enjoy the right to expressive association will "disfavor certain subjects or viewpoints." *Citizens United*, 558 U.S. at 340. "The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each." *Id.* at 34. Left unchecked, the majority's rejection of any associational rights for a broad category of interests will favor and disfavor certain speech and viewpoints.

II. Associations enjoy First Amendment rights to organize to express ideas that are distinct from the rights of individual members

Rehearing should also be granted because the majority opinion failed to adhere to *Boy Scouts of America v. Dale* and *Democratic Party of U.S. v. Wisc. ex*

rel. La Follette when it declined to consider whether a state law imposes a severe burden on the Party, itself. Every group that engages in expressive association enjoys the right to define its own associational rights, thereby communicating its own message. *Democratic Party of U.S. v. Wisc. ex rel. La Follette*, 450 U.S. 107, 122 (1981). An organization enjoys expressive association rights distinct from the rights of its individual members. *Dale*, 530 U.S. at 644. *See also Roberts*, 468 U.S. at 623; *Montano v. Lefkowitz*, 575 F.2d 378, 386 (2d Cir. 1978) ("We recognize . . . that the party itself has an interest in the choice of a candidate . . . ."). Expressive associations speak in many ways, including through the rules that govern the association. *La Follette*, 450 U.S. at 124 n.26 (quoting *Ripon Soc'y, Inc. v. Nat'l Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1974) (en banc)).

In deciding whether a group's association rights have been violated, courts do not try to predict what a majority of the membership would believe about the question at hand; instead, they turn to the group's governing documents and official statements. *Dale*, 530 U.S. at 651 (accepting briefing and a "position statement"). Courts must "give deference to an association's view of what would impair its expression." *Id.* at 653. *Dale*'s reference to a decades-old position statement barring members makes little sense if the burden on expressive association may only be analyzed by summing up or "averaging" the burden on existing individual members. The majority's treatment of a law interfering with the

Party's constitution cannot be squared with *Dale* or *La Follette*. Accordingly, rehearing should be granted.

CONCLUSION

A law severely burdens an expressive association's First Amendment rights when it requires or prohibits political speech or association despite the association's freely-chosen rules and constitution. The Court should grant rehearing or rehearing *en banc*.

Dated: April 25, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will notify counsel for Appellant Utah Republican Party, Appellee Spencer J. Cox, and Plaintiff-Intervenor Utah Democratic Party.

Dated: April 25, 2018

/s/ Edward D. Greim
Edward D. Greim

Attorney for Institute for Free Speech

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 29(b)(4) because it contains 2,240 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: April 25, 2018

/s/ Edward D. Greim
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CERTIFICATE OF DIGITAL COMPLIANCE

I, Edward D. Greim, certify that, in relation to the Brief of Institute for Free Speech as Amicus Curiae in Support of Plaintiff-Appellant's 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).

Dated: April 25, 2018

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