September 25, 2013

VIA ELECTRONIC MAIL AND HAND DELIVERY

The Honorable Gregory S. Bell
Lieutenant Governor
Utah State Capitol Complex, Suite 220
Salt Lake City, Utah 84114-2325

Re: Initiative to Reform Utah's Process for Selecting Party Nominees to Appear on the General-Election Ballot

Dear Lieutenant Governor Bell:

We understand that a newly announced proposal for a statewide Initiative would allow the public to alter Utah's current process for selecting political party nominees to appear on the general-election ballot. A comprehensive legal memorandum by the law firm Caplin & Drysdale, which we have enclosed, examines this Initiative's constitutionality. Without passing judgment on the Initiative's merits as a public policy, we write to express briefly our agreement with the memorandum's conclusion that the Initiative is clearly constitutional.

A law is constitutionally vulnerable in this context only when it imposes a burden on political parties' associational rights that is "severe," as defined under jurisprudence. We believe the Initiative would not impose any burden—"severe" or otherwise—on party associational rights because parties would remain free to endorse favored candidates, select nominees without state input, and determine which voters participate in their primary elections. Indeed, if the Initiative's supposed burden was somehow "severe," then *all* state-administered nomination processes in use across the country would be invalid.[1]

The U.S. Constitution grants the people of Utah and other states power to prescribe the "Times, Places and Manner of holding Elections…"[2] This authority is "broad,"[3] such that the U.S. Supreme Court has repeatedly "considered it to be 'too plain for argument' that a State may prescribe party use of primaries ... to select nominees who appear on the general-election ballot."[4] Utah would therefore act well within its constitutional authority in implementing the Initiative.

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[1] *See* Clingman v. Beaver, 544 U.S. 581, 593 (2005) ("To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel … courts to rewrite state electoral codes.").

[2] U.S. Const. art. I, § 4, cl. 1.

[3] Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986).

[4] New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 203 (2008) (quoting with approval American Party of Tex. v. White, 415 U.S. 767, 781 (1974)). *See also* California Democratic Party v. Jones, 530 U.S. 567, 572 (2000) (quoting with approval American Party of Tex. v. White, 415 U.S. 767, 781 (1974) (stating that it is "'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.").

The enclosed memorandum expands on our concise statements here and, we believe, demonstrates the Initiative's constitutionality.

Sincerely,

John A. Adams Past President Utah State Bar	**Nathan D. Alder** Past President Utah State Bar	**Charles R. Brown** Past President Utah State Bar
N. George Daines Past President Utah State Bar	**Scott Daniels** Past President Utah State Bar	**Bert L. Dart** Past President Utah State Bar
Randy L. Dryer Past President Utah State Bar	**Dennis V. Haslam** Past President Utah State Bar	**Robert L. Jeffs** Past President Utah State Bar
Steven M. Kaufman Past President Utah State Bar	**Charlotte L. Miller** Past President Utah State Bar	**Paul T. Moxley** Past President Utah State Bar
Lori W. Nelson Past President Utah State Bar	**Stephen W. Owens** Past President Utah State Bar	**Rodney G. Snow** Past President Utah State Bar

Enclosure: Caplin & Drysdale Legal Memorandum on Count My Vote Initiative

Caplin & Drysdale, Chartered
One Thomas Circle, NW
Washington, DC 20005-5802

MEMORANDUM

FROM: Joseph M. Birkenstock
Kirk L. Jowers
Bryson B. Morgan
Trevor Potter
Matthew T. Sanderson

DATE: September 3, 2013

RE: Utah's New Primary Election: The Constitutionality of an Initiative Amending Utah's Process for Selecting Party Nominees to Appear on the General-Election Ballot

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Prominent community leaders in Utah plan to support a new initiative that would reform the state's candidate-nomination process (the "Initiative"). The Initiative would, in short, replace the state's current process with a direct primary election. Given Utah's broad power to prescribe election processes, the Initiative is constitutional. In fact, the U.S. Supreme Court has repeatedly declared that it is "'too plain for argument' that a State may require parties to use the primary format for selecting their nominees."[1]

This Memorandum supplies detailed information about the Initiative's substance and presents legal analysis that demonstrates the Initiative's constitutionality.

I. DESCRIPTION OF THE INITIATIVE'S SUBSTANCE

This Section provides relevant background information about the Initiative's substance by explaining Utah's current system for selecting party nominees to appear on the general-election ballot, explaining the Initiative's proposed reforms, and identifying Utah Code amendments necessary to alter Utah's existing scheme.

A. Utah's Current System for Selecting Party Nominees to Appear on the General-Election Ballot

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[1] California Democratic Party v. Jones, 530 U.S. 567, 572 (2000) (quoting with approval American Party of Tex. v. White, 415 U.S. 767, 781 (1974). *See also* New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 203 (2008) (quoting with approval American Party of Tex. v. White, 415 U.S. 767, 781 (1974) (remarking that it is "'too plain for argument' that a State may prescribe party use of primaries … to select nominees who appear on the general-election ballot.").

Utahns elect federal, state, and local government officials through a biennial general election.[2] State law grants certain political parties a role in the election process by giving them the right to have their nominees appear with party endorsement on the general-election ballot.[3]

Utah's two major political parties currently use a "convention-primary" system to select their nominees for placement on the general-election ballot.[4]

A party confers its nomination on a candidate through a state or local convention if the candidate garners more than 60 percent of the convention's delegate vote.[5] Up to 3,500 Republican delegates and 2,645 Democratic delegates participate in their respective party conventions.[6]

If no candidate earns more than 60 percent of a convention's delegate vote, a party certifies its top two convention vote-getters for competition in a post-convention primary election administered by state and local election officials.[7] Utah state law permits a political party to determine whether unaffiliated voters or other parties' voters may participate in this primary election.[8] A candidate appears on the primary-election ballot only if certified by their political party, and no other ballot-access method is provided.[9] The winner of a party's primary election becomes the party's nominee for placement on the general-election ballot.[10]

This "convention-primary" system has been the subject of considerable criticism in recent years. Some argue that the "convention-primary" system presents an unreasonably high

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[2] Utah Code Ann. § 20A-1-201.

[3] Utah Code Ann. §§ 20A-6-302, 20A-9-701. Candidates may also run as "unaffiliated" and "write-in" candidates. Utah Code Ann. §§ 20A-9-501, 20A-9-601. *See also* Utah Code Ann. §§ 20A-8-101(4), 20A-8-106 (describing requirements for becoming a "registered political party," which is given the right to have nominees appear with party endorsement on the general-election ballot).

[4] Utah Code Ann. § 20A-9-701. Utah Republican Party Const. Art. XII § 2(A); Utah Democratic Party Const. Art. II § 4.

[5] Utah Republican Party Const. Art. XII § 2(J); Bylaws of the Utah State Democratic Party Const. Art. II § 4. *See also* Utah Code Ann. § 20A-9-701.

[6] Utah Republican Party Const. Art. XII § 2(B); Bylaws of the Utah State Democratic Party Art. II § 7. Convention delegates themselves are selected through caucus meetings that precede the conventions. Utah Republican Party Const. Art. XII §1; *see* Bylaws of the Utah State Democratic Party Art. IV.

[7] Utah Code Ann. § 20A-1-201.5. Utah Republican Party Const. Art. XII §§ 2(K), 5(J); Bylaws of the Utah State Democratic Party Art. II § 4.

[8] Utah Code Ann. § 20A-9-403(2)(a)(ii). The Utah Republican Party allows only registered Party members to vote in its primary, though previously unaffiliated individuals may vote in the Party's primary election by registering as a Republican at the polls. Utah Republican Party Constitution art. XII § 5(B). *See also* Utah Code Ann. §§ 20A-2-107.5, 20A-9-805. The Utah Democratic Party allows all eligible voters to participate in its primary election. Utah State Democratic Party Constitution art. VII § I.

[9] Utah Code Ann. § 20A-9-403(2)(b).

[10] Utah Code Ann. § 20A-9-403(5)(a).

barrier for popular candidates to access the primary-election ballot.[11] Many assert that the system empowers only a small group to nominate candidates and authorize primary-election ballot access, which disenfranchises a party's broader membership and discourages voter participation overall.[12] Still others raise fraud and election administration concerns.[13] These, among other perceived flaws, have motivated certain Utahns to propose reforms.

B. The Initiative's Proposed Reform to Utah's Process for Selecting Party Nominees to Appear on the General-Election Ballot

The Initiative would address recent concerns with Utah's current process by replacing it with a direct primary election. Specifically, the Initiative would enact two major changes:

- A primary election would serve as the exclusive means of selecting party nominees for public office to appear on the general-election ballot. General-election nominees would no longer be selected through party conventions.
- Utah's federal, state, and local candidates would access the primary-election ballot by submitting verified nomination petitions. A candidate would appear on the primary-election ballot if he or she obtains and submits the signatures of at least 2 percent of a registered political party's members who reside in the jurisdiction of the office the candidate seeks. Candidates would no longer appear on the primary-election ballot as a result of votes by party convention delegates.

This proposal to reform Utah's system for selecting party nominees to appear on the general-election ballot has three main advantages.

First, the Initiative would wholly preserve the power of political parties to select their nominees. Changes to state law would be limited to altering ballot-access and procedural rules. Parties would retain control over which candidates they endorse for the primary election and nominate to appear on the general-election ballot. Parties would also continue to determine whether unaffiliated voters and other parties' voters could participate in their primary election. Utah's political parties would therefore maintain their important electoral function in a reformed system.

Second, the Initiative would facilitate greater participation in Utah's candidate-nomination process. A reformed system would improve candidates' access to the primary-election ballot by permitting qualification through signature petitions. Improved candidate

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[11] *See, e.g.*, Paul Rolly, *Utah Ripe for Election Manipulation*, The Salt Lake Tribune (Aug. 14, 2010) (remarking that "Utah has the highest barrier for a candidate's entry onto a primary election ballot of any state in the nation.").

[12] *See, e.g.*, Scott Konopasek, *The Real Reasons Utah Voter Turnout Could Be Low*, The Salt Lake Tribune (Nov. 16, 2010) (stating that "the current caucus system and political party convention regime for placing names on a ballot takes decisions out of the hands of voters and places it in the hands of a small oligarchy of delegates."). *See also* Bob Bernick, *Poll: Utah State Delegates Out of Step with Most Utahns*, Deseret News (Apr. 28, 2010).

[13] *See, e.g.*, Amie Richards, *Controversy and Constitutionality: An Analysis of the Convention System in Utah*, 12 Hinckley J. of Pol. at 31 (2011) (describing a lack of clear procedures at caucus meetings in selecting delegates).

access to the primary-election ballot would, in turn, mean that a political party's broader membership could consider a wider field of candidates for the party's nomination. A primary election also offers wider accessibility to voting locations and hours that remove the systemic obstacles to participation that are present under the status quo for many Utahns.

Third, the Initiative would drastically reduce the potential for fraud and election irregularities by increasing the use of a carefully and uniformly managed primary election.[14]

The Initiative would therefore resolve certain concerns with Utah's existing method for selecting party nominees to appear on the general-election ballot.

C. Utah Code Amendments Necessary to Alter Utah's Existing Scheme

To implement the Initiative's proposed reforms, amendments to the Utah Code would be necessary. The amendments simply provide that: (1) primary election is the exclusive means of selecting party nominees for public office to appear on the general-election ballot; and (2) a candidate may appear on the primary-election ballot only if he or she obtains and submits the signatures of at least 2 percent of a registered political party's members who reside in the jurisdiction of the office the candidate seeks. These revisions are shown in the Initiative Application, which is appended to this Memorandum.

II. LEGAL ANALYSIS OF THE INITIATIVE

As shown by this Section's legal analysis, the Initiative's proposal to reform Utah's process for selecting party nominees to appear on the general-election ballot is constitutional.

The U.S. Constitution grants Utah and other states "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."[15] This is particularly true where "the State gives the party a role in the election process ... by giving certain parties the right to have their candidates appear with party endorsement on the general election ballot."[16]

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[14] *See, e.g.,* Amie Richards, *Controversy and Constitutionality: An Analysis of the Convention System in Utah*, 12 Hinckley J. of Pol. at 31 (2011) (describing a lack of clear procedures at caucus meetings in selecting delegates).

[15] Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986). *See also* Smith v. Allwright, 321 U.S. 649, 657 (1944) (asserting that a state is "free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government.").

[16] New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 203 (2008). *See also* Smith v. Allwright, 321 U.S. 649, 657 (1944) ("When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election."); Storer v. Brown, 415 U.S. 724, 730 (1974) (declaring that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."); Burdick v. Takushi, 504 U.S. 428, 433

Utah's expansive power is, however, "not absolute"[17] and "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens."[18] Most notably, state election laws and ballot-access rules may potentially affect a political party's associational rights under the First and Fourteenth Amendments.[19]

A court considering a possible constitutional challenge to the Initiative would weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against "the precise interests put forward by the State as justifications for the burden imposed by its rule."[20] Specifically, a court would first determine the extent of the burden that the law imposes on a political party. If the burden is "severe," the court would then strike the law unless it advances a "compelling" state interest in a "narrowly tailored" manner.[21] If the law imposes a lesser burden, however, the court would uphold the proposal so long as it is justified by merely "important regulatory interests."[22]

(1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections.").

[17] Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 451 (2008). *See also* California Democratic Party v. Jones, 530 U.S. 567, 567 (2000) (noting that "[s]tates play a major role in structuring and monitoring the primary election process, but the processes by which political parties select their nominees are not wholly public affairs that States may regulate freely.").

[18] Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 217 (1986). *See also* Williams v. Rhodes, 393 U.S. 23, 29 (1968) (mentioning that election regulations "may not be exercised in a way that violates…specific provisions of the Constitution.")

[19] Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 451 (2008); Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (stating that an election law provision "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects-at least to some degree-the individual's right to vote and his right to associate with others for political ends."). *See generally*, Lauren Hancock, *The Life of the Party: Analyzing Political Parties' First Amendment Associational Rights When the Primary Election Process is Construed along a Continuum*, 88 MINN. L. REV. 159 (2003).

[20] Libertarian Party of NM v. Herrera, 506 F.3d 1303, 1309 (10th Cir. 2007) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

[21] Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 451, 128 S. Ct. 1184, 1191 (2008) (quoting Clingman v. Beaver, 544 U.S. 581, 586-87) ("Election regulations that impose a severe burden on associational rights are subject to strict scrutiny, and we uphold them only if they are 'narrowly tailored to serve a compelling state interest.'"); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) ("Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest."); Burdick v. Takushi, 504 U.S. 428, 434 (1992) ("Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance.' But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify" the restrictions.'") (citing Norman v. Reed, 502 U.S. 279, 289 (1992)); Hagelin for President Comm. of Kansas v. Graves, 25 F.3d 956, 959 (10th Cir. 1994) ("When a ballot access law severely restricts First and Fourteenth Amendment rights, it must be 'narrowly drawn to advance a state interest of compelling importance.'").

[22] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997).

Given the State of Utah's broad authority to prescribe election and nomination processes, Utah law, as modified by the Initiative, is constitutional. The Initiative would not impose a "severe" burden on political parties and would serve "important regulatory interests." And even if the Initiative did somehow impose a "severe" burden, it would advance "compelling" state interests in a "narrowly tailored" manner.

A. The Initiative Is Constitutional Because It Would Not Impose a "Severe" Burden and Would Serve "Important Regulatory Interests"

The Initiative is constitutional under the U.S. Supreme Court's established analytical framework because it would not impose a "severe" burden on political parties and would serve "important regulatory interests."[23]

1. The Initiative Would Not Impose a "Severe" Burden

A political party has an implicit "right of association" under the First and Fourteenth Amendments.[24] "[F]reedom to associate for the common advancement of political beliefs necessarily presupposes the freedom to identify the people who constitute the association."[25] And "[i]n no area is the political association's right to exclude more important than in its candidate-selection process," as that process "often determines the party's positions on significant public policy issues, and it is the nominee who is the party's ambassador charged with winning the general electorate over to its views."[26]

The Initiative's potential opponents may, in fact, argue that *any* Utah election laws affecting the nominee-selection process without a political party's consent would impose a "severe" burden on the party's associational rights.

This assertion is false. A party's associational rights "are circumscribed … when the State gives the party a role in the election process ... by giving certain parties the right to have their candidates appear with party endorsement on the general election ballot."[27] In those

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[23] Clingman v. Beaver, 544 U.S. 581, 586-87 (2005) (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) ("Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest. However, when regulations impose lesser burdens, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'") (internal citations omitted).

[24] *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357 (1997) ("The First Amendment protects the rights of citizens to association and to form political parties for the advancement of common political goals and ideas.").

[25] Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 122 (1981).

[26] California Democratic Party v. Jones, 530 U.S. 567, 568 (2000). *See also* Tashjian v. Republican Party, 479 U.S. 208, 216 (1986) (the selection of a nominee is "the crucial juncture at which the appeal to common principles may be translated into concerted action and hence to political power in the community").

[27] New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 203 (2008). *See also* U.S. v. Classic, 313 U.S. 299, 318 (1941) (remarking that primaries have become an "integral part of the state's electoral machinery."). A party is not entitled to have its nominees appear as party candidates on the general-election ballot. Timmons v.

instances, "the State acquires a legitimate governmental interest in ensuring the fairness of the party's nominating process, enabling it to prescribe what that process must be."[28] Courts,[29] including Utah's highest state court,[30] have upheld state rules that affect a party's nominee-selection process. Indeed, the U.S. Supreme Court has repeatedly considered it "'too plain for argument' that a State may prescribe party use of primaries … to select nominees who appear on the general-election ballot."[31] The Court even endorsed the use of a primary election: "[a] primary is not hostile to intraparty feuds; rather it is an *ideal forum* in which to resolve them."[32] Utah state law gives registered political parties the right to have their candidates appear with party endorsement on the general-election ballot, meaning the Initiative may prescribe a direct primary without imposing a "severe" burden.[33] Potential opponents therefore cannot credibly argue that the Initiative imposes a "severe" burden merely by affecting nominee selection without party consent.

Additionally, any claim that a law imposes a "severe" burden simply by affecting the nominee-selection process without party consent ignores a settled reality across the country. States began to "prescribe party use of primaries" over a century ago, in 1903.[34] Today, "[n]early every State in the Nation now mandates that political parties select their candidates for

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Twin Cities Area New Party, 520 U.S. 351, 359 (1997) (noting that although a party had a "right to select its own candidate," it did not follow "that a party is absolutely entitled to have its nominee appear on the ballot as that party's candidate."); Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008) (upholding election scheme where political parties did not have ability to have a nominee appear on a general-election ballot).

[28] New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 203 (2008).

[29] *See e.g.*, State v. Frear, 142 Wis. 320, 125 N.W. 961, 967 (1910) (upholding a mandatory primary law in the nation's first such case); Wagner v. Gray, 74 So. 2d 89, 93 (Fla. 1954) (upholding primary law, stating: "it does not follow that because the Constitution has conferred the right to vote in a general election, the Legislature is powerless to impose regulations in a primary law that will regulate party nominations.").

[30] Anderson v. Cook, 102 Utah 265, 130 P.2d 278, 285 (1942) (stating that Utah's constitution "cannot be construed to deny the legislature the power to provide regulations, machinery and organization for exercising the elective franchise.").

[31] New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 203 (2008) (quoting with approval American Party of Tex. v. White, 415 U.S. 767, 781 (1974)). *See also* California Democratic Party v. Jones, 530 U.S. 567, 572 (2000) (quoting with approval American Party of Tex. v. White, 415 U.S. 767, 781 (1974) (stating that it is "'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."); Clingman v. Beaver, 544 U.S. 581, 593 (2005) (concluding that "it is beyond question 'that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.'") (quoting with approval Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)).

[32] Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 227 (1989) (emphasis added). *See also* Burdick v. Takushi, 504 U.S. 428, 433 (1992) (observing that the Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls.").

[33] Utah Code Ann. §§ 20A-6-302, 20A-9-701.

[34] MALCOLM E. JEWELL, PARTIES AND PRIMARIES: NOMINATING STATE GOVERNORS 6 (1984).

national or statewide office by means of primary elections."[35] If the Initiative's burden was somehow "severe," *all* state-administered nomination processes would be vulnerable. As the Supreme Court in *Clingman v. Beaver* said:

> To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel … courts to rewrite state electoral codes.[36]

An unfettered and absolute view of party associational rights may have once been a tenable position, but established jurisprudence and on-the-ground facts foreclose political parties from taking this stance in modern litigation. Put differently, a party that asserts the existence of a "severe" burden must do more than point out the general presence of a law; the party must identify a law's particular elements that inflict "severe" burdens.

The scope of the Initiative's particular elements is limited: a stipulation that a candidate may appear as a party's nominee on the general-election ballot only if he wins the party's primary election, and a route to the primary-election ballot through submission of verified nomination petitions. Courts have been specific about which types of rules present "severe" burdens. Judging from these precedents, Utah state law, as modified by the Initiative, does not inflict a "severe" burden because: (a) parties would continue to determine which voters participate in their primary election; (b) parties would select nominees without state input; and (c) parties would be able to endorse candidates.

a. The Initiative's Burden Is Not "Severe" Because Parties Would Continue to Determine Which Voters Participate in Their Primary Election

"Severe" burdens have been most prominently discussed in a line of three U.S. Supreme Court cases considering state restrictions on which voters could participate in a political party's primary election.

First, in *California Democratic Party v. Jones*, the Court held that a so-called "blanket primary" imposed a "severe" burden on a party's right of association. Under California's blanket primary, each voter received a ballot that listed every candidate, regardless of party affiliation, and the voter could then select candidates of his choice. The candidate of each party receiving the most votes advanced to the general election as that party's nominee.[37] The Court was concerned with the blanket primary's potential for facilitating "party raiding," noting that "the prospect of having a party's nominee determined by adherents of an opposing party is far

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[35] Clingman v. Beaver, 544 U.S. 581, 599 (2005) (O'Connor, J., concurring).

[36] Clingman v. Beaver, 544 U.S. 581, 593 (2005). *See also* Burdick v. Takushi, 504 U.S. 428, 433 (1992) (asserting that "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.").

[37] California Democratic Party v. Jones, 530 U.S. 567, 580 (2000).

from remote – indeed it is a clear and present danger."[38] In other words the Court's objection to the blanket primary was that it coerced political parties into having "their nominees, and hence their positions, determined by … those who, at best have refused to affiliate with the party, and at worst, have expressly affiliated with a rival."[39] Thus, the Court concluded that a primary open "to persons *wholly unaffiliated* with the party" [40] imposed a "severe" burden.[41]

Second, the Court in *Tashjian v. Republican Party of Connecticut* struck down a state law that prohibited state parties from allowing independent voters to participate in their primaries.[42] The court reasoned that the statute was void because it "place[d] limits upon the group of registered voters whom the Party may invite to participate in the 'basic function' of selecting the Party's candidates."[43] A state party must therefore have the freedom to include independent voters in its nomination process.[44]

And third, in *Clingman v. Beaver*, a state law allowed registered party members and independent voters to vote in the Oklahoma Libertarian Party's primary election. Contrary to the Libertarian Party's wishes, however, registered Democratic and Republican voters were not permitted to participate. The *Clingman* Court held that the Oklahoma regulation did not impose a "severe" burden on the Libertarian Party's associational rights, largely because the Libertarian Party formed "little association" with "a voter who [was] unwilling to disaffiliate from another party to vote in the [Libertarian] primary."[45]

The *Jones-Tashjian-Clingman* framework, then, shows that a burden on associational interests is "severe" when: (1) state law mandates that members of other parties may participate in a primary election, with party raiding being the prime concern; or (2) state law requires exclusion of independent voters from a party's primary election.

The Initiative does not compel political parties to include or exclude non-members in the nomination process. Existing rules permit a political party to determine whether unaffiliated voters and other parties' voters may participate.[46] The Initiative is silent on the matter and would

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[38] California Democratic Party v. Jones, 530 U.S. 567, 579 (2000).

[39] California Democratic Party v. Jones, 530 U.S. 567, 577 (2000).

[40] California Democratic Party v. Jones, 530 U.S. 567, 581 (2000) (emphasis added).

[41] California Democratic Party v. Jones, 530 U.S. 567, 577 (2000). *See also* Democratic Party of the U.S. v. Wisconsin ex rel La Follette, 450 U.S. 107, 122 (1981) (observing that parties must be able to "protect themselves from intrusion by those with adverse political principles").

[42] Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).

[43] Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 215-16 (1986).

[44] *See* Clingman v. Beaver, 544 U.S. 581, 591-592 (2005) (declaring that "*Tahsjian* applied strict scrutiny with little discussion of the magnitude of burdens imposed by Connecticut's closed primary on parties' and voters' associational rights.").

[45] Clingman v. Beaver, 544 U.S. 581, 589 (2005).

[46] Utah Code Ann. § 20A-9-403(2)(a)(ii). The Utah Republican Party allows only registered Party members to vote in its primary, though previously unaffiliated individuals may vote in the Party's primary election by registering as a Republican at the polls. Utah Republican Party Constitution art. XII § 5(B). *See also* Utah Code Ann. §§ 20A-2-

leave current law in place. The Initiative therefore avoids any possibility of inflicting a "severe" burden under the *Jones-Tashjian-Clingman* framework.

Potential opponents may attempt to claim that the Initiative still forces parties into closer affiliation with rank-and-file party members. They might mention that, before the Initiative, party organizations limited nomination-related affiliation with rank-and-filers to voting on the top two convention vote-getters in certain instances. The Initiative, the argument would go, changes that affiliation by creating a nomination-by-primary system that increases rank-and-file party members' role in nominee selection.

This possible complaint can hardly be characterized as a burden, much less a "severe" burden. Again, the Initiative leaves political parties entirely free to define membership and to determine whether non-members may participate in primary elections. A party's closer affiliation with its own rank-and-file members presents no party raiding concern, as the law invalidated by *Jones* did. And a party that affiliates with its members for all other purposes, including the selection of nominees in marquee races, cannot be severely burdened by a rule that increases rank-and-file participation in lower-profile nominations.[47] As the Ninth Circuit remarked in *Alaskan Independence Party v. Alaska* while reviewing a law similar to the Initiative:

> We are skeptical that such a conflict imposes a severe burden on parties' associational rights. Instead of having its nominee selected or screened by party leadership, the party's nominee is selected democratically by registered party voters (and any others whom the party chooses to let participate), from a slate of all qualified, affiliated candidates who seek the nomination.[48]

Perhaps most significantly, a "political party" is not monolithic. It consists of the party organization, party-affiliated officeholders (i.e. party-in-the-government) and rank-and-file party members (i.e. party-in-the-electorate).[49] Because any possible burden to party bosses' associational rights would be off-set by the enhancement of party rank-and-filers' associational rights, the "party" is not burdened at all by the Initiative.[50] It should also be noted that if the

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107.5, 20A-9-805. The Utah Democratic Party allows all eligible voters to participate in its primary election. Utah State Democratic Party Constitution art. VII § I.

[47] If Clingman stood for the proposition that a party has "little" associational interest in the inclusion of other parties' members, this situation is the corollary—parties can have "little" associational interest in excluding members.

[48] Alaskan Independence Party v. Alaska, 545 F.3d 1173, 1179-80 (9th Cir. 2008).

[49] V.O. KEY, JR., POLITICS, PARTIES & PRESSURE GROUPS 163-165 (1964) (describing the "tripartite" concept of political parties).

[50] New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 205 (2008) ("To be sure, we have, as described above, permitted States to set their faces against 'party bosses' by requiring party-candidate selection through processes more favorable to insurgents, such as primaries.").

Initiative is enacted, it will presumably be because a majority of party rank-and-filers favored the reform at the ballot box, obliging any challenger of the Initiative's constitutionality to peddle the illogical argument that a political party can severely burden itself.[51] Thus, any party allegation of a "severe" burden due to "forced association" would, at bottom, merely be a rehash of a doomed complaint about the general presence of a state-administered nomination procedure.[52]

b. The Initiative's Burden Is Not "Severe" Because Parties Would Continue to Select Nominees without State Input

The U.S. Supreme Court has strictly scrutinized state attempts to choose individuals to hold internal party positions.

In *Cousins v. Wigoda*, certain national-convention delegates from the State of Illinois were chosen through private caucuses and later seated by the 1972 Democratic National Convention.[53] An Illinois state court, however, enjoined this group from acting as delegates in an attempt to install another group that had been selected through a state primary.[54] (These delegate positions did not appear on the state's general election ballot; they were internal party offices whose sole purpose was to attend the party's national meeting and choose presidential and vice presidential nominees.[55]) The *Cousins* Court nullified the state court's injunction, noting that Illinois could not actually choose the delegates when "States themselves have no constitutionally mandated role in the great task for the selection for Presidential and Vice-Presidential candidates" and when the Convention served "the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State."[56]

Similarly, in *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, the Court considered whether Wisconsin could compel the 1980 Democratic National Convention to accept its preferred convention delegation.[57] The Court ruled that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party" in selecting individuals to fill internal party positions.[58]

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[51] *See* Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 Geo. L.J. 2181, 2186 (2001) ("the party organization effectively takes the position of arguing that the 'party' has a First Amendment right to prevent itself from expressing its preferences for particular candidates. Of course, the paternalism inherent in this position is obvious: The party organization is trying to protect the party-in-the-electorate from itself.").

[52] *See* Alaskan Independence Party v. Alaska, 545 F.3d 1173, 1177 (9th Cir. 2008) (noting that a plaintiff's First and Fourteenth Amendment rights were, "[h]owever framed, … an attack on the mandatory direct primary itself").

[53] Cousins v. Wigoda, 419 U.S. 477, 482-483 (1975).

[54] Cousins v. Wigoda, 419 U.S. 477, 482 (1975).

[55] Cousins v. Wigoda, 419 U.S. 477, 480-481 (1975).

[56] Cousins v. Wigoda, 419 U.S. 477, 489-490 (1975).

[57] Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 121-123 (1981).

[58] Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 123-124 (1981). The Court specifically distinguished between the conduct of an actual election and the selection of national-convention delegates

The law of *Cousins* and *La Follette* is that a state may not compel the acceptance of its preferred national-party convention delegation. Several factors undergird this conclusion. For one, a state may not actually select a party's nominee, particularly for a purely internal party position that will not later appear on a general-election ballot. For another, an individual state may not impose rules on a national party's selection of presidential and vice presidential nominees. State regulatory power is at its nadir in such instances because state-based rules would frustrate the national interest served at national conventions and because the U.S. Constitution does not enumerate a regulatory role for states with nationwide candidates as it does with U.S. House and U.S. Senate candidates.[59]

The Initiative does not impose a "severe" burden under *Cousins* and *La Follette*. The Initiative is obviously unrelated to national party conventions, national candidate nominations, and the selection of internal party positions. Moreover, the Initiative would not mandate that any particular individual be chosen as party nominee. Utah's political parties would remain entirely in control of picking which candidates appear as party nominees on the general-election ballot.

c. The Initiative's Burden Is Not "Severe" Because Parties Would Be Able to Endorse Candidates

The U.S. Supreme Court has applied strict scrutiny to state laws that prohibit political parties from voicing their opinions on political candidates in a primary election.

In *Eu v. San Francisco County Democratic Central Committee*, the Court considered the constitutionality of a California state law that banned party entities from "endors[ing], support[ing], or oppos[ing], any candidate for nomination by that party for partisan office in the direct primary election."[60] This raised the possibility that a "candidate with views antithetical to those of her party [could] nevertheless … win its primary."[61] The *Eu* Court voided the law because it "prevent[ed] party governing bodies from stating whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought."[62]

The Initiative forces no such muzzle upon Utah political parties.

Potential opponents would be hard-pressed and therefore unlikely to say the Initiative includes *Eu*-like constraints. Instead, potential opponents may argue the Initiative imposes a "severe" burden by allowing candidates direct access to the primary-election ballot. The

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[59] U.S. Const. Art. I, § 4 cl. 1.

[60] Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 217 (1989).

[61] Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 217 (1989).

[62] Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 223 (1989). *See also* Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution.").

Initiative, they might claim, allows candidates to avoid the status quo's pre-primary convention "screening process" to access the primary ballot, raising the possibility that primary-election voters would assume the party approves of all undesirable candidates based on the candidates' ballot appearance. But it is not apparent how such a "forced association" caused by undesirable candidates in a primary election could be any more burdensome on a party than undesirable candidates in a party convention, which Utah's major political parties currently allow. Not only that, the U.S. Supreme Court rejected an identical claim related to a state general-election ballot in *Washington State Grange v. Washington State Republican Party*:

> [R]espondents' assertion that voters will misinterpret the party-preference designation is sheer speculation. It depends upon the belief that voters can be 'misled' by party labels. But '[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.'[63]

The possibility of this type of "severe" burden on party associational rights is even more remote in a primary election than in *Washington State Grange*, given that the primary's "very purpose … is to allow party voters to choose the party's nominee-to *be* the party's nominee."[64]

The Initiative fully allows any political party to continue to "state[ ] whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought."[65] After the Initiative's enactment, Utah's political party organizations would continue to freely voice their opinions on primary-election candidates and maintain their "right to distance [themselves] from undesired candidates and urge party voters to choose the nominee who the party feels best represents the party platform."[66] The Initiative therefore does not impose a "severe" burden on party associational rights.

2. The Initiative Would Serve "Important Regulatory Interests"

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[63] Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 454 (2008) (quoting Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 220 (1986). *See* Washington State Republican Party v. Washington State Grange, 676 F.3d 784, 793 (9th Cir. 2012) cert. denied, 133 S. Ct. 110, 184 L. Ed. 2d 24 (U.S. 2012) and cert. denied, 133 S. Ct. 110, 184 L. Ed. 2d 24 (U.S. 2012) (ruling, upon remand from the U.S. Supreme Court that "[t]here is nothing inherently misleading about equating a candidate's self-declared party preference with party affiliation: a candidate who has declared a preference for a particular political party has affiliated with that party. The confusion that is at issue here is whether voters mistakenly believe the party has affiliated with the candidate, not vice versa. In light of the clear language of the ballot, the Voters' Pamphlet and the ballot insert, no reasonable voter would be confused…").

[64] Alaskan Independence Party v. Alaska, 545 F.3d 1173, 1179 (9th Cir. 2008) (emphasis in original).

[65] Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 223 (1989).

[66] Alaskan Independence Party v. Alaska, 545 F.3d 1173, 1179-1180 (9th Cir. 2008). *See also* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363 (1997) (upholding state law where the party retained "great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate.").

"[N]ot every electoral law that burdens associational rights is subject to strict scrutiny."[67] A court considering the Initiative's constitutionality would use a lower level of scrutiny because the law imposes a less-than-severe burden. The law would be upheld so long as it is non-discriminatory and justified by merely "important regulatory interests."[68] States are presumed to have "important regulatory interests" in issuing rules that affect the selection of party nominees to appear on the general-election ballot.[69] Even relatively indeterminate interests qualify as "important."[70] Generally speaking, a law that imposes a less-than-severe burden will not be struck down because it fails to serve "important regulatory interests."

Utah law, as reformed by the Initiative, plainly clears this low hurdle. The Initiative is non-discriminatory because it would apply equally to all political parties. And the Initiative's reforms are also justified by numerous "important regulatory interests." To avoid duplicative discussion, though, this Memorandum describes those interests only under the "Compelling State Interests" heading below. It suffices to say here that any "compelling" interest described below would certainly qualify as "important."

B. The Initiative Is Constitutional Because, Even If the Initiative Did Somehow Impose a "Severe" Burden, It Would Advance "Compelling" State Interests in a "Narrowly Tailored" Manner

The Initiative, as discussed, does not impose a "severe" burden on political parties' associational rights. But even if a court did somehow find that the Initiative imposed a severe burden, a court would uphold the Initiative because it advances "compelling" state interests in a "narrowly tailored" manner.[71]

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[67] Clingman v. Beaver, 544 U.S. 581, 592 (2005).

[68] Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997).

[69] *See* Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 122 (1981) (citing U.S. v. Classic. 313 U.S. 299, n. 28 (1941) ("Obviously, States have important interests in regulating primary elections.").

[70] *See e.g.,* Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 458, 128 S. Ct. 1184, 1195, 170 L. Ed. 2d 151 (2008) (holding that a state's "asserted interest in providing voters with relevant information about the ballot is easily sufficient to sustain" state law that imposed less-than-severe burden). *See also* Hagelin for President Comm. of Kansas v. Graves, 25 F.3d 956, 961 (10th Cir. 1994) (upholding law based on state's declared interest in "voter education").

[71] Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 451, 128 S. Ct. 1184, 1191 (2008) (quoting Clingman v. Beaver, 544 U.S. 581, 586-87) ("Election regulations that impose a severe burden on associational rights are subject to strict scrutiny, and we uphold them only if they are 'narrowly tailored to serve a compelling state interest.'"); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) ("Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest."); Burdick v. Takushi, 504 U.S. 428, 434 (1992) ("Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance.' But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify" the restrictions.'") (citing Norman v. Reed, 502 U.S. 279, 289 (1992)); Hagelin for President Comm. of Kansas v. Graves, 25 F.3d 956, 959 (10th Cir. 1994) ("When a ballot access law severely restricts First and Fourteenth Amendment rights, it must be 'narrowly drawn to advance a state interest of compelling importance.'").

1. The Initiative Would Advance "Compelling" State Interests

Assuming for the sake of argument that a court would somehow subject the Initiative to strict scrutiny, the Initiative is still constitutional because it advances many "compelling" state interests. Three of these interests are discussed in the paragraphs below.

a. The Initiative Serves the "Compelling" Interest of Ensuring the Election Process's Integrity and Reliability

Utah and other states have a "compelling" interest, "if not a duty"[72] in protecting the "integrity and reliability [of its] electoral process,"[73] which includes any mechanism for selecting party nominees to appear on the general-election ballot.[74]

The Initiative protects the election process's "integrity and reliability" by deterring and detecting voter fraud.[75] While no evidence of prior voter fraud is necessary to assert a state detection and deterrence interest,[76] Utah has experienced maladministration issues that border on fraud with its current method for choosing nominees to appear on the general-election ballot.[77] At the least, "flagrant examples of such fraud in other parts of the country"[78] warn against Utah's heavy reliance on its free-wheeling and opaque delegate-selection process.[79] Indeed, voter fraud was a clear enough danger in the state to motivate the Utah Legislature recently to enact a strict voter-identification law.[80] It would be irrational to address voter fraud in elections strictly administered by state and local officials and then ignore its potential occurrence in Utah's

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[72] Bullock v. Carter, 405 U.S. 134, 145 (1972) ("State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies."). *See also* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process.") (citing Rosario v. Rockefeller, 410 U.S. 752, 761 (1973)).

[73] Crawford v. Marion County Election Bd., 553 U.S. 181, 190 (2008) (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663, 788 at n. 9 (1966).

[74] Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 231 (1989) ("We have also recognized that a State may impose restrictions that promote the integrity of primary elections. See, *e.g., American Party of Texas v. White*, 415 U.S., at 779-780, 94 S.Ct., at 1305-1306 (requirement that major political parties nominate candidates through a primary and that minor parties nominate candidates through conventions)").

[75] *See* Crawford v. Marion County Election Bd., 553 U.S. 181, 191 (2008).

[76] Crawford v. Marion County Election Bd., 553 U.S. 181, 194 (2008) ("The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history.").

[77] *See e.g.,* Amie Richards, *Controversy and Constitutionality: An Analysis of the Convention System in Utah*, 12 Hinckley J. of Pol. at 31 (2011) (describing a lack of clear procedures at caucus meetings in selecting delegates).

[78] Crawford v. Marion County Election Bd., 553 U.S. 181, 195 (2008).

[79] *See* Alaskan Independence Party v. Alaska, 545 F.3d 1173, 1180 (9th Cir. 2008) ("We have long recognized that a state's interest in eliminating the fraud and corruption that frequently accompanied party-run nominating conventions is compelling, and that a democratic primary is narrowly tailored to advance these state interests.").

[80] *See* Utah Code Ann. §§ 20A-1-102(80), 20-A-3-104.

current procedure-lax nomination system.[81] By providing for the use of primary elections, the Initiative subjects nomination contests to Utah's relatively new voter-identification safeguards that deter and detect voter fraud.

The Initiative also protects the election process's "integrity and reliability" by upholding public confidence in the legitimacy of representative government.[82] While this interest is "closely related" to voter fraud detection and prevention, "confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process."[83] Administrative problems, such as those that plague Utah's scheme for selecting party nominees to appear on the general-election ballot, can undermine faith in the electoral process and a government's legitimacy. The Initiative would avoid such a crisis in confidence by using uniformly administered primary elections to settle nomination contests.

In sum, the Initiative serves a "compelling" state interest by deterring and detecting voter fraud, and by upholding public confidence in the legitimacy of representative government.

b. The Initiative Serves the "Compelling" Interest of Alleviating Current Burdens on the Constitutional Rights of Party Candidates and Rank-and-File Members

Utah's process for selecting nominees to appear on the general-election ballot affects the associational rights of not only political party organizations, but party candidates and rank-and-file members as well. "In enacting elections laws, States must engage in a tough balancing act that culminates in a procedure that protects the rights of political organizations, the rights of candidates, and the rights of voters."[84] With ballot-access rules in particular, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."[85] This is because the "ballot is the '[s]tate devised form' through which candidates and voters are permitted to express their viewpoints and associational preferences in the political forum."[86]

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[81] Scott Konopasek, *Where are the Barriers to Fraud in Utah's Nominating System*, The Salt Lake Tribune (Dec. 26, 2010).

[82] Crawford v. Marion County Election Bd., 553 U.S. 181, 191 (2008).

[83] Crawford v. Marion County Election Bd., 553 U.S. 181, 197 (2008).

[84] Greenville County Republican Party Executive Comm. v. S. Carolina, 6:10-CV-01407-JMC, 2011 WL 1237555 (D.S.C. Mar. 30, 2011).

[85] Bullock v. Carter, 405 U.S. 134, 143 (1972). *See also* Hagelin for President Comm. of Kansas v. Graves, 25 F.3d 956, 959 (10th Cir. 1994) ("Ballot access restrictions burden two different, though overlapping, rights: the right of individuals to associate to advance their political beliefs, and the right of qualified voters to cast effective votes.") (citing Populist Party v. Herschler, 746 F.2d 656, 659 (10th Cir.1984)).

[86] Graves v. McElderry, 946 F. Supp. 1569, 1578 (W.D. Okla. 1996) (quoting Rosen v. Brown, 970 F.2d 169, 175 (6th Cir.1992)). *See also* Lubin v. Panish, 415 U.S. 709, 716 (1974) ("The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of an individual … to a place on a ballot is entitled to protection and is intertwined with the rights of voters.").

By providing candidates access to the primary ballot through nomination petitions, the Initiative serves a "compelling" interest by attempting to rebalance Utah's ballot-access status quo in a manner that would provide greater protection for the constitutional rights of party candidates and rank-and-file members.

i. THE INITIATIVE ENHANCES PARTY CANDIDATES' ACCESS TO THE PRIMARY-ELECTION BALLOT

The "right of an individual to a place on a ballot is entitled to protection,"[87] partly because an "election campaign is a means of disseminating ideas as well as attaining political office."[88] Exclusion "from an opportunity to be a party's candidate burdens the right of political association."[89] Thus, stringent primary election ballot-access restrictions may impinge on party candidates' associational rights.[90] Restrictions are justified only to the extent they require a candidate to demonstrate a "significant modicum of support."[91]

Utah's process for selecting party nominees to appear in the general election features what is, according to some, "the highest barrier for a candidate's entry onto a primary election ballot of any state in the nation."[92] Under existing state law and major-party rules, a candidate may appear on a primary-election ballot only if certified as one of the top two vote-getters at a party convention.[93] Courts typically measure a ballot-access barrier's height by the number of required nomination-petition signatures.[94] Utah's ballot-access scheme is onerous, though, for other reasons. It needlessly rations primary-election ballot positions to a maximum of two candidates, even if others may demonstrate a "significant modicum of support" from primary voters. It is laborious for candidates, requiring them to run a campaign among party insiders just to have rank-and-file party members later consider their candidacies. And it conditions candidates' ballot access on currying favor with an exceedingly narrow slice of party insiders,

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[87] Lubin v. Panish, 415 U.S. 709, 716 (1974).

[88] Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 185 (1979). *See also* Munro v. Socialist Workers Party, 479 U.S. 189, 198-99 (1986) ("[I]f a candidate failed to satisfy the qualifying criteria … the candidate had no ballot-connected campaign platform from which to espouse his or her views.").

[89] Campbell v. Bysiewicz, 242 F. Supp. 2d 164, 176 (D. Conn. 2003) (citing Anderson v. Celebrezze, 460 U.S. 780, 787-788 (1983)).

[90] Anderson v. Celebrezze, 460 U.S. 780, 786 (1983) ("Our primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' Therefore, '[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.'") (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972)).

[91] New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 204 (2008).

[92] Paul Rolly, *Utah Ripe for Election Manipulation*, The Salt Lake Tribune (Aug. 14, 2010) (remarking that "Utah has the highest barrier for a candidate's entry onto a primary election ballot of any state in the nation.").

[93] Utah Code Ann. § 20A-9-403(2)(b).

[94] *See, e.g.*, Norman v. Reed, 502 U.S. 279, 295 (1992) (approving requirement of 25,000 signatures, or approximately two percent of the electorate).

while excluding other candidates who are popular among the party's broader membership.[95] Because a party candidate uses an "election campaign [as] a means of disseminating ideas," these restrictions encumber important associational rights by preventing access to the primary election for some candidates and their ideas.

The Initiative would reduce this burden on party candidates' associational rights by providing better access to the primary ballot. Candidates would access the primary ballot by gathering the requisite number of nomination-petition signatures. The Initiative, then, would permit a candidate who demonstrates a "significant modicum of support" to place his name on the ballot and his ideas on the table for party rank-and-filers' consideration during the primary election. The Initiative serves a "compelling" state interest by providing greater protection for party candidates' associational rights.

ii. THE INITIATIVE IMPROVES VOTING OPPORTUNITIES FOR RANK-AND-FILE MEMBERS

The U.S. Supreme Court has "acknowledged an individual's associational right to vote in a party primary without undue state-imposed impediment."[96] This right is important, given that a "prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process."[97] Party rank-and-filers must be able to consider in a primary election "choices of nominees within a spectrum of ideas consistent with the party's and its members' views."[98] The "exclusion of candidates … burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens."[99] Party members' associational rights are "heavily burdened" if:

> [A] vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot. It is to be expected that a voter

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[95] *See e.g.,* Jamshid Askar, *Olene Walker: Legacy without an Heir*, Deseret News (July 201, 2011) (describing former Utah Governor Olene Walker being denied a place on the Utah Republican primary ballot despite an 81 percent overall approval rating).

[96] New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 204 (2008) (citing Kusper v. Pontikes, 414 U.S. 51, 58 (1973)). *See also* Clingman v. Beaver, 544 U.S. 581, 592 (2005) (O'Connor, J., concurring in part and concurring in the judgment) (expressing the view that "[t]he act of casting a ballot in a given primary may, for both the voter and the party, constitute a form of association that is at least as important as the act of registering.").

[97] Kusper v. Pontikes, 414 U.S. 51, 58 (1973).

[98] Campbell v. Bysiewicz, 242 F. Supp. 2d 164, 175 (D. Conn. 2003). *See also* Anderson v. Celebrezze, 460 U.S. 780, 786 (1983) ("Our primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' Therefore, '[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.'") (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972)).

[99] Anderson v. Celebrezze, 460 U.S. 780, 787-88 (1983).

> hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues.[100]

Harsh ballot-access rules for candidates in the primary election partially disenfranchise broader party membership and therefore may hamper party rank-and-file members' associational rights.

Utah's current system confines rank-and-file party members to limited involvement in selecting nominees to appear on the general-election ballot. Rank-and-filers have no opportunity to consider candidates directly nominated by party insiders at a state or local convention. Rank-and-filers may select a nominee from, at most, two candidates who have been "pre-screened" by a party convention. Party members' associational rights are "heavily burdened" under Utah's existing arrangement because a "vote may be cast only for one or two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot."

Some might argue that the party delegates and leadership act on rank-and-filers' behalf in selecting nominees and winnowing the field of candidates. However, the ability of party insiders to select a nominee "does not assist the party rank and file, who may not themselves agree with the party leadership."[101]

The Initiative would ease the burden on rank-and-filers' associational rights. An accessible primary-election ballot would lead to more nominations decided by rank-and-filers and to more candidates in each nomination contest competing at the primary-election stage. Broader and deeper choices during the primary election will increase the likelihood that a rank-and-filer will "find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." The Initiative serves a "compelling" state interest by providing greater protection for rank-and-file party members' associational rights.

c. The Initiative Serves the "Compelling" Interest of Improving Voter Participation Rates

Voter turnout is vital. In a representative democracy, for example, high voter turnout may be a sign of governmental legitimacy.[102] Voter turnout rates have been dismal under Utah's existing electoral system.[103] A slothful public is not to blame, as Utah's population boasts the

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[100] Lubin v. Panish, 415 U.S. 709, 716 (1974). *See also* Campbell v. Bysiewicz, 242 F. Supp. 2d 164, 175 (D. Conn. 2003) ("Though the state may not dictate a party's choice of its nominee, it may not stand by, nor openly endorse or foster, a process which freezes out the right of party members to participate in the process.").

[101] California Democratic Party v. Jones, 530 U.S. 567, 581 (2000). *See also* Campbell v. Bysiewicz, 242 F. Supp. 2d 164, 176 (D. Conn. 2003) (opining that the "ability of a party's leadership to select party nominees is no substitute for the party members' ability to select their own nominees, which may diverge from the leaders' choice.") (internal quotations omitted) (citing California Democratic Party v. Jones, 530 U.S. 567, 581 (2000)).

[102] *See* Richard L. Hasen, Voting Without Law?, 144 U. PA. L. REV. 2135, 2137 (1996).

[103] *See* Lee Davidson, *Utah Has Nation's Worst Voter Turnout Rate*, Deseret News (July 5, 2008); Lee Davidson, *Utah Voter Turnout is Dismal—Again*, Deseret News (Mar. 23, 2011); Robert Gehrke, *Mitt or Not, Utah Voter Turnout Was Paltry* (Nov. 24, 2012).

highest volunteerism rate of any state in the nation.[104] Recognizing voter turnout's importance in Utah, the state has actively experimented[105] with reforms to bolster participation rates.[106]

The Initiative should be viewed as one part of a comprehensive effort to improve voter participation rates in Utah.

The Initiative's ballot-access reforms would increase electoral competition—the primary election would likely feature more nomination contests and more candidates in each nomination contest.[107] Because increasing electoral competition is a proven method for turning-out voters,[108] the Initiative serves a "compelling" state interest by improving voter participation rates during the primary election.

The Initiative would also motivate candidates and other actors to extend their outreach and get-out-the-vote efforts to a broader swath of citizens. Currently, outreach and get-out-the-vote efforts are limited to party convention delegates, since delegates are the key decision-makers in nomination races. The Initiative, though, would empower a greater number of rank-and-filers, thereby increasing the possibility that they receive attention from candidates and other political actors through methods that can boost participation rates, such as issue-related information and voting reminders. The Initiative would therefore serve a "compelling" state interest by improving voter participation rates during the primary election.

2. The Initiative Advances State Interests in a "Narrowly Tailored" Manner

Assuming for the sake of argument that a court would somehow subject the Initiative to strict scrutiny, the Initiative is still constitutional because it advances the state interests discussed above in a "narrowly tailored" manner. "[W]hen pursuing a legitimate interest, a State may not

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[104] Gina Barker, *Utah Tops the Nation in Volunteering*, The Salt Lake Tribune (Aug. 9, 2011).

[105] California Democratic Party v. Jones, 530 U.S. 567, 601, 120 S. Ct. 2402, 2422, 147 L. Ed. 2d 502 (2000) (noting that states often "experiment with reforms designed to make the democratic process more robust." (Stephens, J. dissenting). *See also* Alaskan Independence Party v. Alaska, 545 F.3d 1173, 1178 (9th Cir. 2008) ("We have also agreed that the State's interest in enhancing the democratic character of the election process overrides whatever interest the Party has in designing its own rules for nominating candidates, such as its desire to nominate through party-run convention.").

[106] *See e.g.*, Pew Center on the States, Press Release, *Governor Herbert, Pew Center on the States, and Hinckley Institute of Politics Collaborate to Modernize Voter Registration* (Jan. 13, 2011) (describing collaborative project to streamline Utah voter registration processes); Bob Bernick, Jr., *Huntsman Appoints Ethics Reform Panel*, Deseret News (Jan. 23, 2009) (discussing Utah Governor Jon Huntsman, Jr.'s appointment of an 18-member commission to recommend reforms for bolstering voter participation rates).

[107] See U.S. v. Classic. 313 U.S. 299, 320 (1941) (stating that political primaries can play an enormous role in determining whether a general election is truly competitive).

[108] League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 471 (2006) (noting that "electoral competition 'plainly has a positive effect on the interest and participation of voters in the electoral process.'") (quoting Trevor Potter & Marianne Viray, *Election Reform: Barriers to Participation*, 36 U. Mich. J.L. Reform 547, 575 (2003)).

choose means that unnecessarily restrict constitutionally protected liberty."[109] A state must use "narrowly tailored" methods, which means it must utilize "the least drastic means to achieve [certain] ends."[110]

The Initiative abides by this "narrowly tailored" requirement. The U.S. Supreme Court has suggested a state-administered primary election that does not pose "party raiding" concerns is "narrowly tailored" *per se*.[111] The Initiative obviously falls within that permissible boundary.

Potential opponents may object to this characterization of the Initiative as limited reform, noting that nomination contests will now be decided through primary elections following the Initiative's passage. But such an objection is, at best, a complaint about the increased *frequency* with which an *existing* nomination-selection method would be used. If the Initiative cannot facilitate increased use of an existing nomination-selection method, it is difficult to conceive of any rule that would qualify as "narrowly tailored."

The Initiative's potential opponents may also argue that the state's particular anti-fraud and election administration interests could be addressed in a more narrow way, by implementing administrative rules for selecting party convention delegates. This path, though, would be more constitutionally questionable than the Initiative's reforms, given the prior rulings about internal party positions in *Cousins* and *La Follette*. New state delegate-selection procedures may also be more invasive than the Initiative's reforms and less successful at advancing these state interests than increased use of a uniformly administered primary election.

The Initiative is therefore constitutional, even if subjected to strict scrutiny, because it advances state interests in a "narrowly tailored" manner.

III. CONCLUSION

The Initiative reforms Utah's process for selecting party nominees to appear on the general-election ballot in a manner that would address prominent criticisms of the state's "convention-primary" status quo. Based on established jurisprudence, a court would uphold the Initiative because it would not impose a "severe" burden on political parties and would serve "important regulatory interests." And even if a court characterized the Initiative's burden as "severe," a court would uphold the Initiative because it would advance "compelling" state interests through a "narrowly tailored" method. We conclude that Utah is constitutionally granted "broad power" that makes the constitutionality of these reforms, as the U.S. Supreme Court put it, "too plain for argument."

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[109] Kusper v. Pontikes, 414 U.S. 51, 58 (1973) (citing Dunn v. Blumstein, 405 U.S. 330, 343 (1972)).

[110] Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 185 (1979). *See also* Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973) ("If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.") (citing Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

[111] *See, e.g.*, California Democratic Party v. Jones, 530 U.S. 567, 585 (2000).