No. 19-309

IN THE

Supreme Court of the United States

GOVERNOR OF DELAWARE,

Petitioner,

—v.—

JAMES R. ADAMS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* PROFESSORS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*

Amici are professors who teach and write in the fields of American constitutional law, corporate law, and Delaware practice and procedure. *Amici* have a professional interest in this Court's application of the principles bearing on the constitutionality of Delaware's judicial selection process. The names, titles, and affiliations of the individual *amici* are listed in the Appendix. This brief is filed in their individual capacities, not as representatives of the institutions with which they are affiliated.[1]

SUMMARY

The Petition should be granted to clarify the *Elrod-Branti* anti-patronage doctrine. The Third Circuit treated the *Elrod-Branti* doctrine as a "least restrictive means" test, rather than an "on-off" test in which the only salient question is whether members of the Delaware judiciary qualify under the *Elrod-Branti* exemption. Members of the Delaware judiciary should qualify under that exemption. While judges do not make "policy" in the same manner as members of the executive and legislative branches, judges do make policy within the meaning of the First Amendment. The Third Circuit's insistence that the *Elrod-Branti* exemption is limited to jobs that

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[1] This *amicus* brief is filed with the consent of the parties. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by any party or any party's counsel.

require loyalty or fidelity to the superior who made the appointment merits this Court's review.

The question is not whether, once *in* office, judges are beholden to the political authority that appointed them. The question is whether, in considering their suitability *for* office, political affiliation is a constitutionally permissible consideration. The Delaware system necessarily results in the exclusion of consideration by the Delaware Governor of members of political parties that do not make it into the top two "major" political parties at any given moment. This exclusion, however, cannot violate the First Amendment if the *Elrod-Branti* exemption applies, because by definition if party affiliation is a permissible requirement for an appointment, members of all other parties will always be excluded. The Third Circuit's decision turns the entire ethos of *Elrod-Branti* on its head. *Elrod* and *Branti* worked to break the headlock of the spoils system on rank-and-file government employment. The "Delaware Way" is animated by virtues entirely aligned with *Elrod* and *Branti*. Delaware has also sought to counteract the spoils system, enacting for judicial selection a system that is quintessentially anti-spoils. It is a perverse application of *Elrod-Branti* to conclude that a state seeking to *renounce* patronage regimes and *embrace* a system well-calculated to deter the evils of patronage is somehow in violation of the Constitution.

The Petition should also be granted to address the sovereign powers of the states over their methods of judicial selection, powers derived from the structure of our federal system, the Tenth Amendment, and the Guarantee Clause. Delaware

is entitled to act, and has acted, as a laboratory for democratic experiment. Its experiment has proved a triumphant success. Delaware has long held a commanding position in American corporate law. That preeminent position is strongly reinforced by the national and global esteem in which the state's judiciary is held. In turn, that preeminence is tied to the qualities of political balance and the high level of judicial independence that the Delaware judiciary enjoys. This Court should grant the Petition to determine whether the Constitution of the United States requires destruction of these cherished Delaware traditions and institutions, or instead protects them.

REASONS FOR GRANTING THE PETITION

I. THE PETITION SHOULD BE GRANTED TO CLARIFY THE *ELROD-BRANTI* ANTI-PATRONAGE DOCTRINE

A. *Elrod-Branti* is an "On-Off" Test, Not a "Least Restrictive Means" Doctrine

This Court's review is warranted to review the Third Circuit's construction of the First Amendment doctrines emanating from *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980). The Third Circuit superimposed upon *Elrod-Branti* a "least restrictive means" analysis of the sort commonly associated with "strict scrutiny" or "exacting scrutiny" review. While accepting as "vital" Delaware's laudatory interest in ensuring political balance in its courts, the Third Circuit held that the State's requirement of balance between the two major political parties was not

the least restrictive means for achieving the State's interest. App. 32a–33a.

The *Elrod-Branti* standard, however, is *not* an ends-means analysis, akin to the strict scrutiny test applicable to content-based regulation of speech. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Rather, *Elrod-Branti* is an on-off test. If the employment position at issue is one for which political affiliation is appropriate, then the First Amendment *absolutely permits* the use of political affiliation. (This exemption, in which the anti-patronage rule of *Elrod-Branti* is turned off, is often referred to by a misnomer, labeling it the "policymaking" exemption.)

The Third Circuit's misapprehension stemmed from its erroneous reading of Justice Brennan's three-Justice plurality opinion in *Elrod*. The *Elrod* plurality applied what it described as "exacting scrutiny," requiring that the justification for the political patronage system used for rank-and-file positions in Chicago and Cook County in the heyday of the first Mayor Richard Daley's machine politics be justified by "paramount" or "vital" government interests and employ the "least restrictive" means to effectuate those interests. *Elrod*, 427 U.S. at 363. In assessing the justification for *the entire patronage system writ large*, the *Elrod* plurality found the system unable to pass this test. *Id* at 372-73. See also *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 69 (1990) (Explaining that *Elrod* "decided that the government interests generally asserted in support of patronage fail to justify this burden on First Amendment rights because patronage dismissals are not the least restrictive means for fostering those interests.").

The plurality in *Elrod* then fashioned its safety valve—the on-off switch—exempting from its patronage prohibition "policymaking positions." The *Elrod* plurality did *not* additionally require the government to justify each classification of a position as "policymaking" under the exacting scrutiny test. Rather, it treated the distinction between policymaking and non-policymaking as *definitional*, so that the position was either "in" or "out" of the First Amendment proscription. *Elrod*, 427 U.S. at 373 (plurality opinion).

Significantly, the short two-paragraph concurring opinion in *Elrod*, written by Justice Stewart and joined by Justice Blackmun, did not engage in any form of ends-means analysis, refusing to review "the broad contours of the patronage system." *Id.* at 374 (Stewart, J., concurring in the judgment). Consistent with the on-off approach, Justice Stewart simply stated: "The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot." *Id.* at 375.

Branti followed suit. The 6-3 decision in *Branti* treated the inquiry *entirely* as an on-off analysis, focusing solely on whether the "position is one in which political affiliation is a legitimate factor to be considered." *Branti*, 445 U.S. at 518. *Branti* purposefully loosened the definitional inquiry, making it clear that neither the word "policymaking" nor the word "confidential" was a talisman. "In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential"

fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* Thus *Branti* relaxed the definitional contours of the *Elrod-Branti* exemption. Most critically, however, *Branti* retained the essential *structure* of the First Amendment standard, which is not a ends-means inquiry, but an on-off switch.

This structural distinction matters. In mistakenly treating *Elrod-Branti* as a "least restrictive means" doctrine, the Third Circuit deemed itself empowered to imagine other ways that Delaware might achieve its goal of muting the influence of partisan politics on its judiciary. This was error. The *only* appropriate inquiry is definitional—whether positions on the Delaware bench do or do not fall within the *Elrod-Branti* exemption.

This is not to say that no judicial judgment is required to analyze the definitional question. As with any constitutional line, there will be close calls. It *is* to say, however, that the nature of the judicial inquiry is not normative but descriptive. This Court's review is warranted to determine if the Third Circuit was right or wrong in placing on Delaware the burden of proving that it has adopted the least restrictive means of achieving its vital interests in a politically balanced judiciary. Rather, the proper question is whether Delaware Judges, Chancellors, and Justices hold positions that fall *definitionally* within the *Elrod-Branti* exemption. If they do, then it is game over, and Delaware wins.

B. Applying the *Elrod-Branti* Exemption to Judicial Selection

Whether members of the Delaware judiciary may be appointed with consideration of their political affiliation is, to borrow from Chief Justice Marshall, "a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). The question, in short, is easier than it looks.

There are two principal objections to recognizing that appointments to the Delaware judiciary qualify under the *Elrod-Branti* exemption. The first, and philosophically most intriguing, is that judges cannot be "policymakers" because they are not authorized to "make policy" but rather must simply "follow the law." This objection resonates with the recurring American debates, prominent in the nation's political and legal discourse, over accusations that judges have in any particular instance usurped the proper judicial role and become activists advancing policy agendas. See Rodney Smolla, *Let Us Now Praise Famous Judges: Exploring the Roles of Judicial "Intuition" and "Activism" in American Law*, 40 U. Rich. L. Rev. 39 (2005). The second objection is that the *Elrod-Branti* exemption should not apply to judges because the *Elrod-Branti* exemption should be limited to positions requiring *loyalty* or *fidelity* to the appointing superior's political agenda. Neither objection is persuasive.

C. Judges Make Policy in a Manner Distinct from the Legislative Branches, But it is Policy Nonetheless for Purposes of the *Elrod-Branti* Exemption

It is fundamentally wrong to conflate the question of whether judges qualify under the *Elrod-Branti* exemption with the question of whether they "make public policy" in the same sense as legislative or executive branch officials. The Third Circuit erred in failing to recognize that the term "policy" in the American system of government has multiple shades of meaning. Each in their own way, the legislative, executive, and judicial branches all make "policy." From the founding of the Republic, state and federal courts have been called upon to resolve profound conflicts which began as political questions but eventually distilled into judicial ones. As Alexis de Tocqueville observed in 1835, "'scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.'" Alexis de Tocqueville, 1 *Democracy in America* 280 (1945 ed.), *quoted in Sierra Club v. Morton*, 405 U.S. 727, 740, n. 16 (1972).

This Court has already largely debunked the notion that state judges do not make policy. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court held that the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. §§ 621–634, did not bar Missouri's mandatory retirement age for state judges. The Court in *Gregory* was faced with the assertion that "judges merely resolve factual disputes and decide questions of law; they do not make policy." *Gregory*, 501 U.S. at 465. Adopting a "clear statement" requirement, the Court ultimately did

not need to decide whether or not state judges fell within the ADEA exemption. Yet the Court wisely observed that the exception for "policymaking" was not necessarily tethered to whether judges make "policy" in the legislative or executive sense:

> The Governor stresses judges' policymaking responsibilities, but it is far from plain that the statutory exception requires that judges actually make policy. The statute refers to appointees "on the policymaking level," not to appointees "who make policy." It may be sufficient that the appointee is in a position requiring the exercise of discretion concerning issues of public importance. This certainly describes the bench, regardless of whether judges might be considered policymakers in the same sense as the executive or legislature.

Id. at 466-67.

As this prescient passage from *Gregory* signals, the resistance to the notion that judges are "policymakers" is misplaced. To be sure, state and federal judges are *not* policymakers in a brazen, partisan, political sense. But this does not mean, for purposes of the *Elrod-Branti* exemption, that judges are outside the realm for which political affiliation is an appropriate consideration. See *Hagan v. Quinn*, 867 F.3d 816, 828 (7th Cir. 2017) ("[J]udges and hearing officers typically occupy policymaking roles for First Amendment purposes.")

To say that theirs is "not to reason why" is not to say that theirs is not to *reason*.[2] As the Seventh Circuit has explained, "[t]he test for whether a position involves policymaking is 'whether the position authorizes, either directly or indirectly, meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation.'" *Kiddy-Brown v. Blagojevich*, 408 F.3d 346, 355 (7th Cir. 2005), *quoting Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

Amici commend to this Court the opinion by Judge Frank Easterbrook for the Seventh Circuit in *Kurowski v. Krajewski*, 848 F.2d 767 (7th Cir. 1988):

> A judge both makes and implements governmental policy...In most states judges are elected, implying that the office has a political component. Holders of the appointing authority may seek to ensure that judges agree with them on important jurisprudential questions. The Governor of Indiana was entitled to consider Krajewski's views about the role of judges—or even simply Krajewski's political affiliation—when making the appointment, just as the voters may consider these factors without violating the first amendment when deciding whether to retain Judge Krajewski in office. (We put aside all debate about

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[2] See Alfred Lord Tennyson, *The Charge of the Light Brigade* ("Theirs not to reason why; Theirs but to do or die.") (1854).

> whether recourse to politics in selecting judges is good or bad; we are concerned only with the constraints the first amendment imposes on the way the State of Indiana prefers to organize its government.)

Id. at 770. Similar views were articulated by Judge Damon Keith, in an opinion for the Sixth Circuit, stating that "[w]e agree with the holding in *Kurowski* that judges are policymakers because their political beliefs influence and dictate their decisions on important jurisprudential matters." *Newman v. Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993). The Sixth Circuit held that with respect to appointments to the state judiciary, "judges are policymakers within the meaning of *Elrod* and *Branti*." *Id.*

Many scholars have recognized the particularly critical policymaking role the Delaware judiciary plays in the superintendence of Delaware corporate law. "Delaware relies heavily on judge-made law, but the structure and operation of the Delaware courts causes Delaware's judicial lawmaking to differ from that in other states. Indeed, the process by which Delaware courts make corporate law resembles legislation in some ways." Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. Cin. L. Rev. 1061, 1064 (2000). "The best-known of the principal policymakers in Delaware are the members of the judiciary." Lawrence Hamermesh, *How We Make Law in Delaware, and What to Expect from Us in the Future*, 2 J. Bus. & Tech. L. 409 (2007). Delaware adopts "a preference that the details of corporate law be shaped in a common law fashion, with

courts as first responders to tensions within the corporate law, at least in areas that are not susceptible to simple statutory clarification." Lawrence Hamermesh, *The Policy Foundations of Corporate Law*, 106 Colum. L. Rev. 1749, 1787 (2006). Many of the defining corporate law doctrines that now dominate corporate governance principles across the United States and indeed the world are the product of Delaware judicial policymaking. "The scope of the business judgment rule, the analysis of transactions that implicate the duty of loyalty, the legal standards governing management's response to a hostile tender offer, all are based on legal principles articulated by the Delaware courts." Fisch, *supra,* at 1074.

"Although judges may sincerely believe that their decisions are governed by the law, their political views subtly color their legal decisions—either knowingly or via cognitive biases, motivated reasoning, or some other mechanism--according to political scientists." Brian Z. Tamanaha, *The Several Meanings of "Politics" in Judicial Politics Studies: Why "Ideological Influence" Is Not "Partisanship"*, 61 Emory L.J. 759, 762 (2012) *citing* Jeffrey A. Segal et al., *The Supreme Court in the American Legal System* 33-35 (2005).

There is nothing unseemly in acknowledging that members of the judiciary, once they assume office, are charged with exercising independent judgment, while at the same time accepting the realist truth that as candidates for judicial office prospective candidates inevitably have views formed on legal issues. "It is virtually impossible to find a judge who does not have preconceptions

about the law." *Republican Party of Minnesota v. White*, 536 U.S. 765, 777-78 (2002). In the words of then-Justice Rehnquist, "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (memorandum opinion).

Reflecting on the nature of judging, Justice Benjamin Cardozo, a giant of American law who exerted great influence on the evolution of the common law as a jurist for the state of New York, and then on constitutional law as a Justice of this Supreme Court, observed:

> There has been a certain lack of candor in much of the discussion ... or perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. Nonetheless, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of man do

> not turn aside in their course and pass judges by.

Benjamin N. Cardozo, *The Nature of the Judicial Process*, 167–68 (1921).

D. No Fidelity to Superiors is Required Under the *Elrod-Branti* Exemption

The Third Circuit's insistence that the *Elrod-Branti* exemption is limited to jobs that require loyalty or fidelity to the superior who made the appointment was flawed, and conflicts with decisions of other federal and state courts. The question is not whether, once *in* office, judges are beholden to the political authority that appointed them. The question is whether, in considering their suitability *for* office, political affiliation is a constitutionally permissible consideration.

The Third Circuit's rule actually works as an assault on judicial independence. "Judges are not politicians, even when they come to the bench by way of the ballot." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1662 (2015). The Third Circuit adopted a *non sequitur*, by presuming that because judges, once assuming office, have obligations of impartiality and independence, they cannot be *selected* in a manner sensitive to party affiliation. Nothing in *Elrod* or *Branti* requires this result:

> The ... approach is unsatisfactory because it assumes that *Branti* and its progenitor, *Elrod* ... permit an appointing officer to consider the appointee's political views only when the appointee carries out the appointing official's own "policy". If this is so then, for example, the governor could

> not consider a would-be judge's politics when deciding whom to appoint (because the judge is independent of the governor once in office), and the President could not consider the views of a prospective appointee to the Federal Trade Commission when making that selection. Neither *Elrod* nor *Branti* makes anything turn on the relation between the job in question and the implementation of the appointing officer's policies.

Kurowski, 848 F.2d at 770.

"A State may assure its people that judges will apply the law without fear or favor." *Williams-Yulee*, 135 S. Ct. at 1662. Once judges and justices assume office, they are no longer properly identified as minions of the authority responsible for their appointment. As the Chief Justice has observed: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for."[3] There is, in short, a "twist" to the *Elrod-Branti* analysis unique to the judicial

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[3] Robert Barnes, *Rebuking Trump's criticism of 'Obama judge,' Chief Justice Roberts defends judiciary as 'independent'*, *The Washington Post*, November 21, 2018, available at: https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2aaad09_story.html?noredirect=on

role. As Sixth Circuit Judge Nathaniel Jones, concurring in *Newman*, elegantly explained:

> Judicial appointments present an interesting twist on that analysis. For example, while a judge may be a "policymaker" in a broad sense, a judge is not a "policymaker" for the appointing governor. Rather, the judiciary is an independent arm of the government, unconnected by oath or duty to the governor's office or political party. Once appointed, a judge does not and should not answer to a governor's directives or opinions. Therefore, the link between an appointee judge and the appointing governor is fundamentally different from the link between a governor and other gubernatorial appointees who are appointed to fulfill the political or policy objectives of a governor.

Newman, 986 F.2d at 164 (Jones, J., concurring).

E. Once the Propriety of the Exemption is Recognized, "Discrimination" Against an Excluded Party Cannot Violate the First Amendment

The Delaware system necessarily bars the Delaware Governor from considering members of political parties that do not make it into the top two "major" political parties at any given moment. The identities of the current two "major" parties in Delaware, Democratic and Republican, are not perpetual. The pertinent provisions of the Delaware Constitution identify no party by name. To achieve its goal of balance, Delaware simply limits judicial selection to the top two "major"

parties, whatever they may be at any point in time. There is nothing to preclude the Delaware electorate from lifting up a new party as one of the top two "major" parties in its politics, the "Tea Party" or "Green Party," or any other, in which case that party would assume a place as one of the two major parties.

The Delaware system thus by definition "excludes" parties that do not make the top-two cut. But this truism does not violate the First Amendment if judges qualify under the *Elrod-Branti* exemption. For by definition *all* positions qualifying under the *Elrod-Branti* exemption exclude members of *all* parties other than the party favored by the appointing authority.

To punctuate this point, consider the federal model. Presidents of the United States have throughout history used party affiliation and ideology as litmus tests for nominations to the federal judiciary, from the Supreme Court on down. See Dawn E. Johnsen, *Should Ideology Matter in Selecting Federal Judges?: Ground Rules for the Debate*, 26 Cardozo L. Rev. 463, 472 (2005). Only the most naïve would believe that politics and ideology do not play a central role in nominations to the federal bench:

> Presidents, senators, and interest groups alike realize that the judges themselves are political. Candidates for the federal bench receive their nominations precisely because through their political work or interests they came to the attention of some politician, most likely a U.S. senator or a member of the president's staff.

Lee Epstein & Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* 3 (2005).

This long historical practice surely does not violate the First Amendment. Yet it is, by its nature, inherently exclusionary. In a literal sense the federal model "discriminates" on the basis of political affiliation and ideological viewpoint. A conservative Republican President who makes it clear he or she is interested in filling judicial vacancies only with Republicans simpatico to the President's conservative views necessarily excludes all non-Republicans. A liberal Democratic President who makes it clear he or she is interested in filling judicial vacancies only with Democrats simpatico to the President's liberal views necessarily excludes all non-Democrats. Senators, exercising their concomitant powers of consent, may also be unabashedly political in the exercise of their constitutional prerogatives. See Michel Stokes Paulsen, *The Constitutional Propriety of Ideological "Litmus Tests" for Judicial Appointments*, University of Chi. Law Rev. Online 28 (2017)[4] ("Isn't it obvious? The Constitution prescribes an explicitly political process for the nomination, confirmation, and appointment of US Supreme Court justices and lower federal court judges. The president has the exclusive power of nomination and may exercise that power on the basis of any criteria he or she sees fit. The Senate has the power to provide its 'advice' and—if it wishes—its 'consent' to such a nomination.").

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[4] https://pdfs.semanticscholar.org/8404/6430182d94a21180ff620f23c2fc285f58c3.pdf

The Third Circuit's decision, distilled to its core, rests entirely on the perceived constitutional infirmity of a Delaware system that excludes, as it must, members of any party other than the party taking its turn in the rotation. If the *Elrod-Branti* exemption applies, however, this objection is entirely illogical. For by definition, in *any* system in which reference to political affiliation is deemed permissible for a pending appointment, any political party other than the chosen one will be excluded.

F. Delaware Has Decided that the Spoils Do Not Belong to the Victor

The Third Circuit's decision turns the entire ethos of *Elrod-Branti* on its head. *Elrod* and *Branti* worked to break the headlock of the spoils system on rank-and-file government employment. The "Delaware Way" is animated by virtues entirely aligned with *Elrod* and *Branti*. Delaware has sought to counteract the spoils system when it comes to judicial selection, adopting a system that is quintessentially anti-spoils. It is a perverse application of *Elrod-Branti* to conclude that a state seeking to *renounce* patronage regimes and *embrace* a system well-calculated to deter the evils of patronage is somehow in violation of the Constitution. *Elrod-Branti* decided that to the victor do *not* belong all the spoils. Delaware has decided the same thing. It should not be penalized for it.

II. THE PETITION SHOULD BE GRANTED TO ADDRESS THE SOVEREIGN POWERS OF STATES OVER STATE JUDICIAL SELECTION

A. Judicial Selection Regimes Reside at the Core of State Sovereignty

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory*, 501 U.S. at 457. "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), *quoting Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869).

The system of dual sovereignty divides power, and in that division preserves liberty as ancient as democracy itself. "The liberty of the ancients is the liberty of citizens to govern themselves through their own political institutions." Charles Fried, *Federalism-Why Should We Care?*, 6 Harv. J.L. & Pub. Policy 1, 2 (1982). "This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory*, 501 U.S. at 458, *citing* Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy:*

Federalism for a Third Century, 88 Colum. L. Rev. 1, 3–10 (1988).

Delaware has a powerful interest as a sovereign "in establishing its own form of government." *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973). "In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office." *Wilson v. North Carolina*, 169 U.S. 586, 594 (1898). "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937).

Balancing judicial selection by alternating between the two major political parties cannot offend the First Amendment, as already demonstrated, if members of the judiciary fall outside the *Elrod-Branti* doctrine. The propriety of applying the *Elrod-Branti* exemption is reinforced by Delaware's Tenth Amendment and Guarantee Clause rights as a sovereign.

Delaware's sovereign right under the Tenth Amendment to experiment in advancing the art of governance is reinforced by the Constitution's Guarantee Clause, Article IV, § 4. The Guarantee Clause declares that the "United States shall guarantee to every State in this Union a Republican Form of Government." The Guarantee Clause is a two-way street. It plainly operates as a restraint upon the states. Yet it also operates as an empowerment to the states, a recognition of the states' sovereign autonomy and dignity. "[T]he

words of the guarantee clause suggest a limit on the power of the federal government to infringe state autonomy." Merritt, *supra*, at 3. At stake is Delaware's defining identity, cutting to the core of its integrity and dignity as a sovereign. See *Gregory*, 501 U.S. at 460 ("The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.")

B. Delaware is Entitled to Act as a Laboratory for Democratic Experiment

Justice Brandeis famously expounded the virtues of allowing states to serve as laboratories of experiment, equipped to "try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Delaware has engaged in such an experiment, deliberately fashioning a judiciary that is politically balanced. It has worked. The Delaware judiciary has garnered widespread respect in national and global legal and economic markets. Federal courts should tread with extreme caution before presuming to encroach on Delaware's right to proceed with its experiment.

In the pursuit of its experiment, Delaware has sought to de-politicize its judiciary by rotating appointments among the top two parties. This structure enhances stability and discourages

attempts to game the system. There is nothing constitutionally untoward in Delaware's preference for the stability of a balanced two-party rotation system over a regime of unrestrained factionalism. The pursuit of such stability was an animating value of the founders of the Republic, and states are free to embrace it as well. *Storer v. Brown*, 415 U.S. 724, 736, (1974) ("A State need not take the course California has, but California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government.") *citing The Federalist*, No. 10 (Madison). See *also Rutan*, 497 U.S. at 197 (Scalia, J., dissenting) (Observing, "Not only is a two-party system more likely to emerge, but the differences between those parties are more likely to be moderated," and adding, "The stabilizing effects of such a system are obvious.")

C. The Delaware Experiment Has Been a Triumphant Success

Delaware's experiment has been a triumphant success. Most visibly, Delaware has long held a leading position in American corporate law. Lawrence A. Hamermesh, *The Challenge to Delaware's Preeminence in Corporate Law Federal Interference May Not Pose the Greatest Danger to the State's Future Success*, Del. Law., Fall 2009, at 8 ("We need not dwell long on our State's well-known success in providing a legal home for corporations and other business entities. More than 850,000 entities, including over half of all U.S. publicly traded companies and over 60 percent of the Fortune 500 companies, are organized under Delaware law."). *See also U.S.*

Chamber Institute for Legal Reform 2019 Lawsuit Climate Survey: Ranking the States, September 18, 2019 (Ranking Delaware judiciary #1 in U.S. in "Trial Judges Impartiality," "Trial Judges Competence," and "Quality of Appellate Review.").[5]

Delaware's commanding position as the premier American forum for the adjudication of corporate law disputes is inextricably tied to the widespread acknowledgement of the high competence of its judiciary. See Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 Colum. L. Rev. 1908, 1911 (1998) ("Delaware courts have earned a unique reputation for quality adjudication. This reputation is particularly meaningful since the quality of courts can be ascertained only through the use of their services."); Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 Nw. U. L. Rev. 542, 589 (1990) ("My explanation depends primarily on Delaware's expert judges."); Fisch, *supra*, at 1094 ("Consider next the proficiency of Delaware courts, which commentators widely acknowledge to be a competitive advantage."); E. Norman Veasey, *Professionalism and Pragmatism—The Future: A Message from the Chief Justice of Delaware*, Del. Law., Winter 1993, at 13 (Delaware's Chief Justice emphasizing the connections between Delaware's national

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[5] https://www.instituteforlegalreform.com/pages/2019-executive-summary?utm_source=website&utm_medium=carousel&utm_campaign=ilr_main_site&utm_term=https://www.instituteforlegalreform.com/pages/2019-executive-summary

prominence and its consistent capacity to attract quality judges).

In turn, that preeminence is tied to the qualities of political balance and the high level of judicial independence that the Delaware judiciary enjoys. Fisch, *supra*, at 1094 ("Finally, the Delaware Constitution mandates balance between the two major political parties in appointment of Delaware judges. These factors contribute to insulating Delaware judges relative to legislators from political influence."); Hamermesh, *How We Make Law in Delaware*, supra, at 409 ("These Delaware judges are particularly interesting because of their appointive, nonpolitical, nonpartisan character."); Marcel Kahan and Edward Rock, *Symbolic Federalism and the Structure of Corporate Law*, 58 Vand. L. Rev. 1573, 1612 (2005) ("Indeed, since Delaware's judiciary is less politicized and has greater claim to expertise in corporate law than the federal judiciary, its rulings enjoy greater legitimacy than would corporate rulings of federal judges").

CONCLUSION

In arguing *The Dartmouth College* case, *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 688 (1819), Daniel Webster declaimed, "It is sir, as I have said, a small college. And yet there are those who love it!"[6] Delaware is but a small state. And yet there are those who love it, for its traditions of bipartisan civility, and its governing institutions, including a highly qualified and independent judiciary deliberately fashioned to diminish partisan influence. This Court should grant the Petition to determine whether the Constitution of the United States requires destruction of those Delaware traditions and institutions, or instead protects them.

Dated: October 3, 2019

Respectfully submitted,

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[6] https://www.americanheritage.com/it-small-college-yet-there-are-those-who-love-it

APPENDIX[7]

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Ashutosh Bhagwat, Martin Luther King, Jr. Professor of Law and Boochever and Bird Endowed Chair for the Study and Teaching of Freedom and Equality, University of California, Davis School of Law

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Bruce Grohsgal, Helen S. Balick Professor in Business Bankruptcy Law, Widener University Delaware Law School

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[7] The amici file in their individual capacities, not as representatives of the institutions with which they are affiliated.

Justice William C. Koch, Jr. (Ret.), President and Dean of the Nashville School of Law

Michael S. McGinniss, Dean and Associate Professor of Law, University of North Dakota School of Law

Helen Norton, Rothgerber Chair in Constitutional Law, University of Colorado School of Law

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