No. 19-309

IN THE

Supreme Court of the United States

JOHN C. CARNEY, 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* FORMER CHIEF JUSTICES OF THE DELAWARE SUPREME COURT IN SUPPORT OF PETITIONER

VIRGINIA A. SEITZ*
KATHLEEN MORIARTY MUELLER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
vseitz@sidley.com

Counsel for Amici Curiae

* Counsel of Record

October 7, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

CONSTITUTION

RULE

SCHOLARLY AUTHORITIES

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Honorable Myron T. Steele and the Honorable E. Norman Veasey, both former Chief Justices of the Supreme Court of Delaware.

In 2000, Myron T. Steele (Democrat) was nominated to the Supreme Court of Delaware by Governor Thomas Carper (Democrat). Governor Ruth Ann Minner (Democrat) elevated him to the position of Chief Justice in 2004, where he served until 2013. He had previously served on the Superior Court of Delaware, as a judge of the Kent County Superior Court and as Vice Chancellor of the Delaware Court of Chancery. Prior to his appointment to the Superior Court, he served as chair of the Democratic Party in Kent County. He was appointed to the Kent County Superior Court by Republican Governor Mike Castle to maintain political balance, since the only other judge of that court at the time was a Republican. During his tenure as Chief Justice, he was President of the Conference of Chief Justices and Chair of the National Center for State Courts Board of Directors. Former Chief Justice Steele teaches, speaks, and publishes frequently on issues of corporate law.

In 1992, E. Norman Veasey (Republican) was nominated to be Chief Justice of the Supreme Court of Delaware by Governor Mike Castle (Republican). He served in that position until 2004, when his twelve-

---

[1] Pursuant to Supreme Court Rule 37, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici curiae* and their counsel made any monetary contribution toward the preparation and submission of this brief. Both petitioner and respondent consented to the filing of this brief.

year term as Chief Justice expired. During his tenure as Chief Justice, then-Governor Minner awarded Chief Justice Veasey the Order of the First State, the highest honor the Governor can bestow. Like Chief Justice Steele, Chief Justice Veasey was President of the Conference of Chief Justices and the Chair of the National Center for State Courts Board of Directors. He also teaches, speaks, and publishes frequently on issues of corporate governance, ethics, and professionalism. He had previously served as Deputy Attorney General and Chief Deputy Attorney General of the State of Delaware. From 2011 through 2013, he served as Independent Counsel and Special Deputy Attorney General to investigate campaign funding law violations.

Both long-serving former Chief Justices have lengthy and deep experience within the Delaware judiciary, in corporate law practice, and in public service for the State. They are uniquely positioned to address the importance of the Delaware Constitution's judicial-selection provisions to the State, its political culture and processes, and its judiciary. Notably, they have explained why that constitutional selection process embodies Delaware's view of the appropriate balance between independence and democratic accountability in the judiciary. See *infra* pp. 12-13. In addition, as former Presidents and Chairs of national bodies of state judges, they can speak to the legitimacy and importance of politics in the wide variety of judicial selection processes that different States have employed since the Founding—processes whose constitutionality is called into question by the decision of the court of appeals under review.

SUMMARY OF ARGUMENT

The Delaware Constitution provides that judges are appointed by the governor for twelve-year terms, subject to confirmation by a majority of the senate. Del. Const. art. IV, § 3. The governor's appointment power is limited by the requirement that no more than a "bare majority" of judges on the supreme court and the principal lower courts may be affiliated with "one major political party," while the other judges "shall be of the other major political party." *Id.* The two major political parties in Delaware today are the Democratic Party and the Republican Party. Thus, the practical effect of these provisions is to require the governor to fill a judicial vacancy with a Democrat or a Republican, depending on the political affiliation of the other judges. This has been the lasting effect of the judicial selection system under the Delaware Constitution since 1897, a period of 122 years of bipartisan and respected jurisprudence.

The Third Circuit readily acknowledged that these provisions have given Delaware "an excellent judiciary" that has earned "nearly universal" praise for its fairness, efficiency, and "'national preeminence in the field of corporation law.'"[2] The court held, however, that the provisions "must be stricken" from the State's Constitution. The court concluded that Delaware's judicial selection process violates the First Amendment of the U.S. Constitution by prohibiting the governor from appointing a judge due to his or

---

[2] Pet. App. 38a-39a (McKee, J., joined by Restrepo and Fuentes, JJ., concurring) (quoting William H. Rehnquist, Chief Justice of the U.S., Address at the Bicentennial of the Delaware Court of Chancery (Sept. 18, 1982), *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, *in* 48 Bus. Law. 351 (1992)).

her "affiliation with a particular political party." Pet. App. 29a, 35a. There are compelling reasons for this Court to review that decision.

The Third Circuit acknowledged, and the Petition shows, that the decision created a circuit split. Pet. App. 27a; Pet. 13-18. This alone provides a strong case for this Court's review. See Sup. Ct. R. 10. *Amici* show, moreover, that this Court's review is independently warranted because the Third Circuit's decision calls into question the constitutionality of the processes for making judicial appointments to federal and state courts throughout the nation.

The method used to achieve Delaware's balanced bipartisan judicial system—the selection of judges based on party affiliation—is both widespread and longstanding. From the founding of the country through today, party affiliation has frequently—indeed, almost universally—been used as a criterion for selecting or rejecting judges within the United States. In some states, judges are chosen by the voters in partisan elections. In others, judges are appointed by governors who often exercise their discretion to select or reject individual candidates based on whether they are affiliated with, or supported by, a particular party. Federal judges, too, are often selected by the President—and sometimes accepted or rejected by the Senate—on partisan grounds. See *infra* pp. 6-8.

The rationale for the Third Circuit's decision that Delaware's judicial selection process is unconstitutional—that it requires that a nominee be the member of a particular party—would render unconstitutional any system in which party affiliation is a prerequisite for nomination, whether that requirement is imposed by positive law, or by the executive branch official (the President, the governor) who makes the

nomination, or by the voters who pull the lever for a judicial candidate based on his or her party affiliation. The Third Circuit's decision thus calls into question virtually all judicial selection processes. See *infra* pp. 9-11.

This Court's review is further warranted because the Third Circuit fundamentally misunderstood—and thus violated—this Court's First Amendment jurisprudence and failed to respect Delaware's sovereign authority to structure its judiciary. The decision is inconsistent with the Court's analysis in *Gregory* v. *Ashcroft*, 501 U.S. 452, 463 (1991), which instructs federal courts to apply "less exacting" scrutiny to, and thus give more deference to, state constitutional provisions establishing the qualifications of judges. Delaware's constitutional judicial selection process is the product of a thoughtful political choice. It has "historically produced an excellent judiciary," Pet. App. 38a, that is lauded for the competence and impartiality of its judges, and has resulted in a centrist jurisprudence that enhances public confidence in the judiciary and yields significant benefits to the State as a whole, *infra* pp. 11-13. The Third Circuit has invalidated Delaware's longstanding judicial selection process in a decision that does not sufficiently respect either the choice or its value. See *infra* pp. 11-14.

The decision also misunderstands this Court's decisions in *Elrod* v. *Burns*, 427 U.S. 347 (1976) (plurality opinion), and *Branti* v. *Finkel*, 445 U.S. 507 (1980). Those decisions address when political party affiliation may be considered in selecting executive and legislative branch employees. They do not address the relevant constitutional history and tradition of judicial appointments, which reflect the judgment that judges should be accountable to the people (in varying degrees depending on the mode of selection) as

well as independent in the execution of their role. Nothing in *Elrod* and *Branti* suggests that that judgment and longstanding tradition violate the First Amendment. To the contrary, *Branti* recognized that it is appropriate to select precinct election judges based on party affiliation. 445 U.S. at 518. Thus, the Third Circuit's decision is inconsistent with this Court's decisions, with devastating effect on Delaware and far-reaching implications for states and the country as a whole. See *infra* pp. 14-17.

REASONS FOR GRANTING THE PETITION

I. THE DECISION THAT JUDGES MAY NOT BE SELECTED BASED ON PARTY AFFILIATION CALLS INTO QUESTION STATE AND FEDERAL JUDICIAL SELECTION PROCESSES.

The means Delaware has chosen to achieve a politically balanced judiciary—the selection of judges based on party affiliation—is common practice in most other states and in the federal system. The decision here is vitally important because it has implications for, and indeed opens to question, all such selection processes.

From the founding of the country, those with the power to select judges have used party affiliation or support as a criterion for selecting or rejecting judicial nominees. John Marshall, "universally referred to as 'the great Chief Justice'" of this Court, was selected in that manner. See William H. Rehnquist, *The Supreme Court* 103 (1987). He was nominated to fill a vacancy created by the resignation of Chief Justice Oliver Ellsworth in December 1800. "By then it already appeared that the election of 1800 had gone against the Federalists, and John Adams felt a strong need to put a dedicated Federalist on the bench be-

fore the government should come into the hands of Jefferson and the Republicans." *Id.*

Since then, Presidents have looked "almost entirely to their own party for appointments to the federal bench despite pleas from various quarters for bipartisan—or apolitical—appointment." Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 Ohio St. L.J. 221, 227 (2003). President Franklin Roosevelt "almost never looked outside the Democratic Party for judicial appointments." *Id.* "President Reagan appointed no Democrats to the courts of appeals." Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 Geo. L.J. 965, 978 n.47 (2007). "From FDR's first term through [President] Clinton's last, 91% of Democratic appointees have been Democrats and 92% of Republican appointees have been Republicans." George, *supra*, at 227.

Even when Presidents look outside their own party for judicial nominees, they nevertheless often base their decisions on the nominee's party affiliation. For example, President Truman nominated Republican Senator Harold Burton to fill the vacancy created by the retirement of the lone Republican Justice on the Court whose other members had all been appointed by Franklin Roosevelt, because there was "[c]onsiderable public sentiment" that the "new justice ought to be a Republican." Rehnquist, *supra*, at 86. And "[f]acing a Senate that was split down the middle, and an impending election, President Herbert Hoover, a Republican, decided to nominate a prominent Democrat," Benjamin Cardozo, "to fill the seat vacated by Justice Oliver Wendell Holmes." Jonathan H. Adler, *The Senate Has No Constitutional Obligation to Consider Nominees*, 24 Geo. Mason L. Rev. 15, 28 (2016).

These examples highlight the role of the Senate, which has long "appreciated the patronage potential of [its] Article II role in judicial appointments."[3] "There is a long history of Senate refusal to fill judicial vacancies, including by a simple refusal to consider Presidential nominees," based on their party affiliation. Adler, *supra*, at 26-27 (discussing instances where the Senate, controlled by Democrats, refused to take action on Republican Presidents' nominees); see also, *e.g.*, Jess Bravin, *President Obama's Supreme Court Nomination of Merrick Garland Expires*, Wall St. J. (Jan. 3, 2017) (discussing Republican-controlled Senate's refusal to take action on the Supreme Court nominee of a Democratic President).

State judges, too, are frequently selected based on party affiliation. Supreme court justices in six states are elected in partisan elections, where voters choose judges from candidates affiliated with a political party.[4] In two states, justices are selected by the legislature, which typically means that successful judicial candidates must obtain the support of the majority party.[5] And twenty-seven states use some form of gu-

---

[3] George, *supra*, at 234 (discussing role of "Senators, particularly from the President's party" in influencing "the selection of nominees to the lower federal courts"); *see also, e.g.*, Sheldon Goldman, *Judicial Appointments to the United States Courts of Appeals*, 1967 Wis. L. Rev. 186, 189, 199-200 (1967) (same).

[4] *See* Alicia Bannon, Brennan Ctr. for Justice, *Choosing State Judges: A Plan for Reform* 3 (2018), https://www.brennancenter.org/sites/default/files/publications/2018_09_JudicialSelection.pdf.

[5] *See* Bannon, *supra* note 4, at 3; *see also* Douglas Keith & Laila Robbins, Brennan Ctr. for Justice, *Legislative Appointments for Judges: Lessons from South Carolina, Virginia, and Rhode Island* 3 (2017), https://www.brennancenter.org/sites/default/files/analysis/North_Carolina.pdf (viable judicial candi-

bernatorial appointment system.[6] In many of these states, the governor must appoint someone from a list of judicial candidates screened by an independent nominating commission. See Bannon, *supra* note 4, at 3. But even there, governors often make selections based on party affiliation and political support.[7]

All of these judicial selection procedures are threatened by the Third Circuit's decision. The Third Circuit interpreted this Court's precedents as allowing selection based on political affiliation only for those "employees whose jobs 'cannot be performed effectively except by someone who shares the political beliefs of [the appointing authority].'" Pet. App. 28a (alteration in original). Because the judicial branch is supposed to be independent of the political branches, *id.* at 23a-24a, and because "[t]here can be no serious

---

dates in South Carolina must secure "commitments" from state legislators, while "in Virginia, the majority party selects judges in closed-door caucus meetings").

[6] In seventeen of these twenty-seven states, justices are appointed by the governor for a set term and must be re-elected in single-candidate retention elections (in sixteen states) or partisan retention elections (in one state) to continue for additional terms. Bannon, *supra* note 4, at 3. In the remaining ten states, judges are appointed by the governor and not subject to retention elections. *Id.*

[7] *See* Rachel Baye, Ctr. for Pub. Integrity, *Donors, Friends of Governors Often Get State Supreme Court Nod* (May 19, 2014) https://publicintegrity.org/federal-politics/donors-friends-of-governors-often-get-state-supreme-court-nod. Even a leading critic of the election of state court judges agrees that the judicial selection process should be "*publicly accountable*," and recommends a system in which judicial candidates are screened by an "independent, bipartisan judicial nominating commission" and then appointed by the governor who "may consider whatever factors she wishes—judicial philosophy, political party membership, even personal friendship." Bannon, *supra* note 4, at 6.

question that judicial candidates of different political parties can effectively serve as state judges," the court held that "states cannot condition judicial positions on partisan political affiliation alone," *id.* at 28a. That reasoning would apply equally to anyone who aspired to a judicial appointment but was not considered or appointed by a governor or President who decided to nominate a candidate from another political party. It would also apply to any judicial candidate who was not elected because the voters wanted a judge from a different political party.[8]

It is irrelevant that it is the Delaware Constitution—rather than the governor's personal decision—that requires consideration of the political party affiliation of a judicial nominee. The Third Circuit's analysis does not distinguish these situations, and there is no relevant distinction for First Amendment purposes. See Pet. App. 27a (disagreeing with the Sixth Circuit in *Newman* v. *Voinovich*, which rejected a First Amendment challenge to the Ohio "Governor's practice of considering only members of his party," 986 F.2d 159, 163 (6th Cir. 1993)). In both situations, the decision-maker for judicial appointments has excluded from consideration candidates for judicial office based on their political affiliation. And in both instances, the decision-maker is a state actor subject to the requirements of the Constitution, however those requirements are construed in this setting.

---

[8] Ironically, the Third Circuit's decision bars Delaware's constitutional process, which includes partisan considerations in judicial appointments as a way of *reducing* partisanship in the judiciary and shielding the judiciary from certain kinds of political influences, but fails to mention—let alone analyze the implications of its decision for—these overtly partisan judicial selection processes.

Under the Third Circuit's analysis, all of these decisions are subject to First Amendment challenge, including potentially discovery into and litigation about the decision-maker's approach. See *Newman*, 986 F.2d at 160 (discussing testimony of Governor's Special Assistant for Boards, Commissions and Judges and stipulation of the Governor before trial); *Kurowski* v. *Krajewski*, 848 F.2d 767, 769 (7th Cir. 1988) (discussing findings of magistrate judge after a bench trial).

The importance of the First Amendment question, *infra* pp. 14-17, thus provides a compelling case for this Court's review.

II. THE THIRD CIRCUIT FUNDAMENTALLY MISUNDERSTOOD THIS COURT'S PRECEDENTS AND WRONGLY INVALIDATED PROVISIONS OF THE DELAWARE CONSTITUTION THAT HAVE PRODUCED AN EXCELLENT JUDICIARY.

This Court's review is also warranted because the Third Circuit fundamentally misunderstood this Court's First Amendment jurisprudence and failed to respect Delaware's sovereign authority to structure its judiciary.

A. Delaware's Political Balance Requirement Has Produced An Excellent Judiciary.

The Delaware Constitution has required a politically balanced judiciary since 1897. Pet. App. 3a-4a. The adoption of this provision was no accident. It was the considered response to the prior system in which judges had been appointed by the governor for life, without the need for confirmation by the Senate. See Joseph T. Walsh & Thomas J. Fitzpatrick, Jr., *Judiciary: Article IV*, *in* THE DELAWARE CONSTITUTION OF

1897: THE FIRST ONE HUNDRED YEARS 130, 131 (Harvey Bernard Rubenstein ed., 1997). A few infirm judges declined to retire, and there was debate in the 1897 Convention about how to improve the judiciary and the judicial selection process. *Id.* at 132. Some urged Delaware to follow the trend in other states at that time and switch to an elected judiciary, which would directly reflect the will of the people. *Id.* Others countered that qualified members of the bar would not subject themselves to the election process, and that elections would result in politically-oriented judges. *Id.* Some urged the adoption of an appointive system subject to Senate confirmation, while others worried that there could be gridlock if the Senate were controlled by a different political party. *Id.*

In the end, the Convention "adopted the system that has endured to this day: appointment by the governor for twelve-year terms subject to Senate confirmation." *Id.* at 133. To this, the delegates added the political balance requirement "in the face of the widespread belief that every effort should be made to ensure that the judiciary not be dominated by any political party." *Id.* at 134.

As the Third Circuit acknowledged, this selection process "has historically produced an excellent judiciary" in Delaware. Pet. App. 38a. The political balance requirement means that the governor cannot "stack" the judiciary with members of his own party, so the senate feels less political pressure to reject the governor's judicial nominees in times of divided government.

In *amici*'s experience, this selection system has depoliticized the issue of judicial appointments in Delaware. Because both major parties know that they will have members on the judiciary, they have less incentive to stake out partisan positions on the type

of judges they will appoint and to urge voters to vote for a governor and senators who will select "their" type of judges.

In addition, in *amici*'s view, the depoliticized nature of the selection process has helped attract to the Delaware Bench quality lawyers who tend to be "a centrist group of jurists committed to the sound and faithful application of the law." Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 Del. J. Corp. L. 673, 683 (2005). Delaware is a small state, with fewer than one million people and just three counties. But the "independent and depoliticized judiciary" has led, "in [our] opinion, to Delaware's international attractiveness as the incorporation domicile of choice." E. Norman Veasey with Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. Pa. L. Rev. 1399, 1402 (2005). It may well be the central reason why more than half of the Fortune 500 companies and half of the New York Stock Exchange corporations are incorporated in Delaware. See E. Norman Veasey, *The Drama of Judicial Branch Change in This Century*, 17 Del. Law. 4, 4 (1999).

In sum, the political balance requirement has endured for decades and across many political administrations in Delaware. In the view of *amici*, this norm helps to further public confidence in the Delaware Supreme Court as a fair and impartial arbiter of the law.

B. The Third Circuit Misunderstood *Elrod* and *Branti* And Failed To Respect Delaware's Sovereign Right To Establish The Qualifications Of Its Judges.

Although the Third Circuit acknowledged Delaware's constitutional judgment that the political balance requirement has been integral to the success of the Delaware judiciary, it failed to accord the State's judgment any weight in the First Amendment analysis. See Pet. App. 39a-41a & n.5. This Court's review is warranted because that mode of analysis is flatly inconsistent with *Gregory*, 501 U.S. at 463, which requires federal courts to apply "less exacting" scrutiny to state constitutional provisions establishing the qualifications of judges. As a result, the Third Circuit's decision invalidated Delaware's judgment with respect to judicial selection in the State. In addition, the decision fundamentally misunderstands this Court's First Amendment jurisprudence, in a manner detrimental to judicial selection processes across the Nation. See Pet. 27-36.

This Court has long held that "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Gregory*, 501 U.S. at 462 (alteration in original) (quoting *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973) (quoting *Boyd* v. *Neb. ex rel. Thayer*, 143 U.S. 135, 161 (1892))). A state constitutional provision establishing the qualifications of state judges is a constitutional provision "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." *Id.* at 460. A State's power to prescribe the qualifications of judges is therefore "exclusive, and free from external interference, except so far as plainly provided by the

Constitution of the United States." *Id.* (quoting *Taylor* v. *Beckham*, 178 U.S. 548, 570-71 (1900)).

The First Amendment does not prohibit Delaware from considering a judicial candidate's party affiliation as a condition of appointment for the salutary purpose of ensuring a politically-balanced judiciary. In holding otherwise, the Third Circuit erroneously applied the "policymaking exception" developed in *Elrod* and *Branti* to address when it is permissible to consider party affiliation in filling positions in the *executive and legislative* branches without recognizing that the selection of *judges* involves significantly different considerations.

To be sure, as the Third Circuit stated, the judiciary is a separate branch of government that is independent of the executive and legislative branches in Delaware, Pet. App. 24a, as in other states and the federal government. Moreover, there is "no serious question that judicial candidates of different political parties can effectively serve as state judges." *Id.* at 28a. But neither of those facts means that States may not select judges based on "partisan political affiliation." *Id.* This Court's cases, history and common sense demonstrate that Presidents, governors, legislators, and electorates may chose judges based on their political affiliation and thereafter judges may fulfill their judicial role in an independent and nonpartisan manner.

As the Seventh Circuit explained, "[n]either *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. For example, the job of an election judge is to ensure the fair administration of the election laws, not to implement the partisan policies of the appointing official. This Court nevertheless said in *Branti*

that the "position may be appropriately considered political," because the State could decide to have a precinct supervised by two judges from different parties, and then "party affiliation" would be an "appropriate requirement" for the position. *Branti*, 445 U.S. at 518. This reasoning applies with full force to judicial selection.

In holding that party affiliation cannot be an appropriate qualification for a judge, the Third Circuit entirely ignored the long history and tradition of selecting federal and state court judges based on party affiliation and support. See *supra*, Part I. That itself is reason to question the court's conclusion, for "a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change" is likely to be constitutional. *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014) (Establishment Clause). See also, *e.g.*, *Burson* v. *Freeman*, 504 U.S. 191, 206 (1992) (plurality opinion) (deferring to the "widespread and time-tested consensus" that a prohibition on political speech and campaigning around polling booths is necessary to prevent "voter intimidation and election fraud"); *id.* at 214 (Scalia, J., concurring in the judgment) (refusing to invalidate restrictions that are a "venerable" part "of the American tradition"); *Mistretta* v. *United States*, 488 U.S. 361, 398-399 & n.22 (1988) ("contemporaneous practice by the Founders themselves is significant evidence" that it is consistent with the separation of powers).

Had the court considered this historical practice, moreover, it would have realized that the selection of judges on partisan grounds is a permissible byproduct of the Founders' choice in the U.S. Constitution, which was replicated in varying ways in state constitutions. Specifically, the Founders chose to make the

judiciary accountable to the people as well as independent of the other branches. Courts are independent of the other branches and "of popular opinion when deciding the particular cases or controversies that come before them." Rehnquist, *supra*, at 236. However, the constitutional system is designed to give the people some say in the selection of judges, *id.*, either indirectly (through election of the officials who appoint and confirm judges), or directly (through election of judges themselves).

The fact that the public receives a say in the selection of judges supports the Sixth and Seventh Circuit's conclusion that judges "mak[e] on the state's behalf the sort of decisions about which there are political debates." *Newman*, 986 F.2d at 163 (quoting *Kurowski*, 848 F.2d at 770). And given that important decision-making role, the "office has a political component," and individuals who appoint judges and voters who select them may base their decisions on the judge's political affiliation "without violating the First Amendment." *Kurowski*, 848 F.2d at 770.

For these reasons, the Third Circuit's decision is both wrong and important. If allowed to stand, it will render numerous judicial selection processes vulnerable to challenge by aspiring judges who were not considered because of their party affiliation. The First Amendment does not require that ahistorical, disruptive outcome.

CONCLUSION

The petition should be granted.

Respectfully submitted,

VIRGINIA A. SEITZ*
KATHLEEN MORIARTY MUELLER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
vseitz@sidley.com

Counsel for Amici Curiae

October 7, 2019

* Counsel of Record